



REPUBLIC OF KENYA



**KENYA LAW**  
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**Curzon v Muthama & 2 others (Environment & Land Case  
993 of 2016) [2023] KEELC 19132 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19132 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 993 OF 2016**

**AA OMOLLO, J  
JULY 27, 2023**

**BETWEEN**

**PAUL CURZON ..... PLAINTIFF**

**AND**

**MARTIN NGAO MUTHAMA ..... 1<sup>ST</sup> DEFENDANT**

**STEPHEN KIRIANKI NKANYAANA ..... 2<sup>ND</sup> DEFENDANT**

**JOHN OMULUBI OMUTIMBA T/A MATRIX AUCTIONEERS .... 3<sup>RD</sup>  
DEFENDANT**

**RULING**

1. The Plaintiff filed a notice of motion dated June 21, 2021 seeking for the orders that;
  1. Spent
  2. Spent
  3. That judgement of this Honourable Court of November 16, 2022 be and is hereby set aside and or varied against the 3<sup>rd</sup> Defendant.
  4. In the alternative, Order 4 of the judgement dated November 16, 2021 directing that costs of the suit are payable by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be and is hereby set aside and or varied against the 3<sup>rd</sup> Defendant.
  5. Costs of this application.
  6. That the costs of this application be in the cause.
2. The application was supported by an affidavit sworn on June 21, 2022 by John Omulubi Omutimba, the 3<sup>rd</sup> Defendant, stating that he was not served with summons in this case and that he came to learn



- of the suit on June 12, 2022 when served with a taxation notice and immediately instructed his lawyer who entered appearance and appeared before Hon. Diana Orago on June 13, 2022 and was informed that the correct case number was ELC No 993 of 2016 and not ELC No 933 of 2016 as was indicated on the Taxation notice.
3. The Applicant further stated that he is an Auctioneer who was acting on the instructions of the 1<sup>st</sup> and 2<sup>nd</sup> defendants and who the court has found judgement against them specifically citing them in the three orders, hence they should be ordered to meet the cost.
  4. In opposition to the Application, counsel for the Plaintiff swore an affidavit dated August 16, 2022 stating that the 3<sup>rd</sup> Defendant was duly served with summons and appointed an Advocate who on August 29, 2016 filed a memorandum of Appearance and a Replying affidavit sworn by the 3<sup>rd</sup> Defendant in opposition of the Plaintiff's application seeking orders of injunction. Further, he stated that the 3<sup>rd</sup> Defendant broke in the suit property that was occupied by the Plaintiff in the pretense that he was recovering rent owed to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and that his counsel fully participated during the prosecution of the suit and cross examined the Plaintiff on July 26, 2018.
  5. Mr Ojiambo advocate deposed that after the court issued summons on August 19, 2022, he tasked Juma Danga, a process server, to effect service upon the 3<sup>rd</sup> Defendant at his office on 2<sup>nd</sup> Floor, Wami House along Jogoo Road, Nairobi on the same day. He added that the 3<sup>rd</sup> Defendant declined to receive service but directed the process server to serve the summons and all pleadings upon his Advocates, Osundwa & Co Advocates who received and stamped the same.
  6. Counsel averred on behalf of the Plaintiff/Respondent that upon close of the Plaintiff's case, the 3<sup>rd</sup> Defendant sought leave to file his Defence and witness statement and the court granted him 21 days to do so. He further averred that on 20/9/2018 the 3<sup>rd</sup> Defendant was given further 14 days to file the defence and after several adjournments for failure to file the same, parties took directions to file their submissions for final determination of the case.
  7. Further the Plaintiff stated that when he filed an application dated 13/3/2020 seeking to reopen his case, the 3<sup>rd</sup> Defendant vehemently opposed the same vide grounds dated 22/2/2021 but still neglected to file his defence and witness statement. Thus, the Applicant cannot say he was unaware of the suit and the subsequent judgement rendered by the court in his presence of his counsel. That he has not laid a basis to be exonerated from paying the costs of the suit as ordered in the judgement.
  8. The Plaintiff filed his submissions dated November 22, 2022 outlining the background of the case and reiterating that the 3<sup>rd</sup> Defendant was duly served and given five (5) opportunities to offer evidence in his defence but resorted to seeking adjournments to deliberately delay the determination of the suit.
  9. The Plaintiff submits that the 3<sup>rd</sup> Defendant's application is premised on false grounds and depositions thus does not deserve the court's mercy and in support, cited the court of appeal in Nai Civ Appl/E213/2022 *Martin Ngao Muthama v Paul Curzon* where that court dismissed an application premised on unmitigated false depositions.
  10. The Plaintiff further submitted that the application raises issues meant for appeal as it premised on points of law and attacking the merits of the judgement and the same will re-open litigation. He cited the case of *Ferrotech v Mwadziwe Ali* [2021]. Further, the Plaintiff argued that the application has not met the threshold for review and stay of taxation proceedings asserting that for an order to be reviewed, a mistake must be an obvious and clear inadvertence as held in *Harrison Amolloh Okumu v Perez Okumu & 3 others* [2021]eKLR. Also, the 3<sup>rd</sup> Defendant admitted that the proceedings and



judgement are not ex parte hence his motion seeks to awaken a functus officio court and re deploy it on an already determined cause.

11. The Plaintiff also submitted that there has been inordinate delay in filing this application for review since the judgement was entered on November 16, 2021 in the presence of counsel for the 3<sup>rd</sup> Defendant. To explain the delay, the Plaintiff cited the Court of Appeal decision in *Julius Oloo v Lilian Wanjiku* [2019] which held that an application for review must be brought without unreasonable delay.
12. The Plaintiff affirms that the 3<sup>rd</sup> Defendant acting on instruction of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as their agent does not excuse his own acts of fraud as it was those fraudulent acts that were instrumental in the 1<sup>st</sup> and 2<sup>nd</sup> Defendants grabbing and possessing the Plaintiff's property. He quoted the case of *NSSF V Ankhan Holding Ltd* 2006 where the court established that no one can escape liability for his fraud by saying that they acted on behalf of someone.
13. I have not seen the applicant's submissions on record and the inference drawn is that the application has not been prosecuted.

### Analysis

14. The Plaintiff filed a suit against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants which was determined in his favour with costs to be paid by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants. The 3<sup>rd</sup> Defendant filed this application seeking to set aside the order of costs made against him on the grounds that he was not aware of the suit and that he acted on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants hence should be exempted from paying cost. The Plaintiff vehemently opposed the motion stating that the 3<sup>rd</sup> Defendant was duly served with court documents and participated in the proceedings. That his own acts of fraud cannot be excused as they were instrumental in 1<sup>st</sup> and 2<sup>nd</sup> Defendants grabbing and possessing the Plaintiff's property.
15. The issue for this court to determine is whether the orders entered against the 3<sup>rd</sup> Defendant should be varied and or set aside for the reasons stated on the face of the application. The Plaintiff has explained in detail how he effected service of summons to enter appearance on the 3<sup>rd</sup> Defendant including taking the court documents to his office. That the 3<sup>rd</sup> Defendant directed the process server to his advocate, Osundwa and Co advocates who was served and who indeed filed a memo of appearance which is on the court record. As deposed by the Plaintiff/respondent, the record does bear that the said advocate participated in the proceedings on behalf of the 3<sup>rd</sup> Defendant after there was a notice of change filed for his representation of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
16. Section 107 of the *Evidence Act* provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. Section 108 is also to the effect that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side, while section 109 states that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. The burden therefore lies with the 3<sup>rd</sup> Defendant to prove that the service effected on him was irregular.
17. In the case of *Shadrack arap Baiywo vs. Bodi Bach* KSM CA Civil Appeal No 122 of 1986 [1987] eKLR, the Court of Appeal quoting Chitale and Annaji Rao; *The Code of Civil Procedure* Volume II page 1670 stated that:

“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.”

18. There is an affidavit of service filed detailing how service was effected upon the 3<sup>rd</sup> Defendant and it is also on the court record that a memorandum of appearance was filed but no defence filed. It is also in the court record that counsel for 3<sup>rd</sup> Defendant was present during the hearing and cross examined the Plaintiff on his evidence. It is also notable that the 3<sup>rd</sup> Defendant did not object that the Advocates, Osundwa & Co Advocates acted under his instructions.
19. It is a general rule law that Advocate’s failure to execute his client’s instructions amounts to professional negligence. This was the position in *Water Painters International -v- Benjamin Ko’goo t/a Group of Women in Agriculture Kochieng (Gwako) Ministries* (2014) eKLR, where the Court stated that;  

“...in the words of justice Ringera in *Omwoyo vs African Highlands & Produce Co. Ltd* (2002 J) KLR, time has come for the legal Practitioners to shoulder the consequences of their negligent acts of omissions like other professionals do in their fields of endeavour. The Plaintiff should not be made to shoulder the consequences of negligence of the defendant’s Advocates. This is a proper case where the Defendant’s remedy is against its Advocate, while suing advocates for professional negligence and not setting aside the judgment.”
20. Like in the case above, the 3<sup>rd</sup> Defendant/Applicant has recourse against the advocate who acted without instructions instead of making the Plaintiff to suffer the inconvenience of re-opening his case. I note from the record that the 3<sup>rd</sup> Defendant was given numerous chances to file a defence in the matter but was negligent. He is therefore not deserving the exercise of this courts discretion in his favour. As a result, the argument that there was no service of summons to enter appearance is dislodged for lack of proof.
21. The second argument pleaded was the Applicant faulting the order made against him when there existed an agency relationship between him and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. This argument borders on the merit of the decision which ought to have formed a ground for appeal. Be that as it may, the Plaintiff/Respondent has highlighted the actions of the 3<sup>rd</sup> Defendant which made him liable specifically that he contributed to the dispossession of the Plaintiffs property. Further, there was no evidence or submission presented to the court by the 3<sup>rd</sup> Defendant for determination on the apportioning of costs. The awarding of costs is a discretion of the court and the Applicant has not made a basis why this court should exercise the discretion for review the decree on costs.
22. Consequently, I find no merit in the application and proceed to dismiss it with costs to the Plaintiff/ Respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JULY 2023**

**A. OMOLLO**

**JUDGE**

