



Ecoeng Limited v Ominde & another (Environment & Land Case E350 of 2022) [2023] KEELC 19134 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19134 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E350 OF 2022**

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

BETWEEN

ECOENG LIMITED PLAINTIFF

AND

WALTER EDWIN OMINDE 1ST DEFENDANT

GRACE SELLINA OMINDE 2ND DEFENDANT

RULING

1. The Applicants filed a notice of motion dated January 27, 2023 seeking for the following orders;
 1. Spent
 2. Spent
 3. This honorable Court be pleased to stay proceedings in this matter and for avoidance of doubt to stay the intended pre-trial scheduled for February 1, 2023, pending the hearing and determination of this application.
 4. This honorable Court be pleased to vary/set aside it's orders given on the December 19, 2022 and issued on the January 9, 2023 and to grant leave to the Defendants /Applicants to file a response to the Plaintiff /Respondent's Notice of Motion application dated November 29, 2022.
 5. This honorable court be pleased to grant leave to the Defendants/Applicants to file their defence in this matter.
 6. The costs of this Application be provided for.



2. The motion was supported by two affidavits both sworn by Walter Ominde Ogutu on January 27, 2023 and February 24, 2023 respectively. The Defendants stated that the Summons to Enter Appearance has never been served on them and a suit does not commence until the same is done. They further stated that the Plaintiff/Respondent filed a notice of motion application dated November 29, 2022 seeking for interlocutory injunctions among others which application was never served to them except a partial service of the documents done on January 19, 2023 through Whatsapp from an unregistered cell phone number 0704543768.
3. The Defendants further stated that the hearing notice dated December 2, 2022 of the impugned application shows the same was signed by an unqualified person, due to the similarities of the signature on the contested Affidavit of service dated December 5, 2022. They contended that the Affidavit of service dated December 5, 2022 is incurably defective for offending the provisions of Section 4(1) [Cap 15](#) Laws of Kenya because it was stamped and commissioned by Jackline PA Omolo, an Advocate and Commissioner for Oaths who has filed this suit on behalf of and in her position as the director of the Plaintiff, making it inadmissible under the rules of evidence.
4. The Defendants stated that there having been no proper return of service, this court proceeded in error to grant the substantive Orders on December 19, 2022 and issued on January 9, 2023, with the main suit set for pre-trial conference on February 1, 2023 thus prejudicing them as they were condemned unheard.
5. The Plaintiff/Respondent filed a replying affidavit sworn by Jackline PA Omolo on February 15, 2023 in opposition to the application. She deposed that Summons to enter Appearance against the Defendants issued on November 8, 2022 together with a plaint, list of witnesses and list of documents were served on the Defendants on November 9, 2022 via whatsapp of the 1st Defendant's telephone number 0722775531 and service of the Notice of Motion dated November 29, 2022, its hearing notice dated December 2, 2022, court's directions issued on December 1, 2022 were all served under the same number on December 2, 2022.
6. The Plaintiff stated that the Defendants failed to enter appearance and or file their defence within the statutory period. The Plaintiff contend that the law does not prohibit a Licensed Court Process Server from signing a hearing notice as was signed by Mr Charles Mutiso Mulu who is a Licensed Court Process Server, because it is not form of a pleading which would require an Advocate of the High Court of Kenya to affix his/her signature. Further, the Plaintiff having commissioned the Affidavit of service in her capacity as an Advocate of the High Court of Kenya does not affect the correctness and admissibility of the same and cannot be struck out merely on technicalities as set out in Order 19 Rule 7 of the [Civil Procedure Rules 2010](#).
7. The Plaintiff added that in the impugned affidavit of service, the Certificate of Urgency, Notice of Motion and Supporting Affidavit is indicated November 29, 2022 instead of November 30, 2022 due to a typographical error. The Plaintiff also aver that the Defendants do not disclose any valid reasons for failing to defend the suit and that the court should dismiss their application to ensure just, expeditious and efficient disposal of the main suit.
8. The 1st and 2nd Defendants filed submissions dated March 6, 2023 while the Plaintiff filed theirs dated April 26, 2023. The Defendants submitted that the proceedings and orders granted on 19th December 2022 were irregular as the 1st and 2nd Defendants were not served as required under Order 5, rule 7 of the [Civil Procedure Rules 2010](#). In support, they cited the case of [Jacquiline Muthoni Wachira v Mwasalimu Investment Company Limited & Ors](#) (ELC No 568 of 2017; Thika) where the court held that Order 5 rule 7 of the [Civil procedure Rules](#) is couched in mandatory terms, ie where there are more



Defendants than one, service of the summons shall be made on each Defendant. That the amendments to the Civil Procedure Rules [Order 5 Rule 22C] on service by way of mobile relied upon by the Plaintiff does not dispense with the need of service on all the defendants. The Defendants submitted that in the entire Affidavit of service the process server never mentioned service on the 2nd Defendant.

9. The Defendants submitted that it is only the process server and not the Plaintiff's director who can explain the error on the affidavit of service therefore she cannot purport to contradict the process server's aversion on the dating on the motion which he received and served.
10. The Defendants further submitted that the Plaintiff's director is not qualified to exercise any powers given as a commissioner for oaths for a proceeding in which she is an advocate of any of the parties to the proceeding or concerned in the matter, or in which she is interested as provided for in Section 4 of the Oaths and Statutory Declarations Act Cap 15. To buttress this argument, they relied on the decision of Petition No1 of 2017(Nyahururu); Lesrima Simeon Saimanga v IEBC & 2 Others where the court agreed with the Caltex Oil case in deciding that affidavits commissioned contrary to section 4(1) of Cap 15 which is statutory provision cannot be remedied by Order 19 which is a subsidiary legislation, therefore defect in affidavits that goes to the substance and not the form do not amount to affidavits known in law.
11. The Defendant relied on Article 50(1) of the Constitution which provides for fair hearing to submit that they were not served with the pleadings, summons and application in subject therefore not given a chance to be heard. They also cited the decision in Kakamega HCCA No125 of 2018; SM v HGE and Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another [2018] Eklr.
12. The Plaintiffs submitted that stay of proceedings is a grave matter to be entertained only in the most deserving cases as it impacts the right to expeditious trial stating that upon the consideration of the facts and circumstances of the case the Defendants herein have not provided sufficient reason warranting stay of proceedings /orders. In support of this submission, the Plaintiff cited a plethora of cases among them the Court of Appeal decision in David Morton Silverstein v Atsango Chesoni (2002)Eklr and Kenya Wildlife Service v James Mutembei(2019)eKLR where courts emphasized on exercise of judicial discretion to grant stay of proceedings.
13. The Plaintiffs submitted that the 1st Defendant was served with the summons to enter appearance and the pleadings thereof, therefore were aware of the suit against them and ought to have defended the same. That the Defendants want the court to stay proceedings as a tactic to deprive them justice and if the court sets aside its orders, the Plaintiff will suffer more prejudice as the Defendants have defaulted in making good their promise to perform their contractual obligations.
14. The Plaintiffs submitted that the affidavit of service dated December 5, 2022 cannot be termed to be fatally defective merely because the Plaintiff's director commissioned it stating that she commissioned the same in her capacity as an Advocate of the High Court of Kenya. She referred to the case of Kaiser Investments Limited v Hua Run Company Limited & 3 Others [2021] eKLR which held that Section 4(1) of the Oaths and Statutory Declaration Act can be subject to different interpretations, where it can be argued that good practice would entail having affidavits drawn by a firm on record in a matter sworn before a different firm of advocates but failure to do so does not mean that the averments are totally false or defective.

Analysis

15. The Defendants/Applicants application is seeking the court to set aside its entered orders given on the December 19, 2022, grant them leave to file a response to the Plaintiff /Respondent's Notice of Motion application dated November 29, 2022 and file their defence in this matter. Primarily, the Defendants



- aver that they were not served with the summons to enter appearance, and the application in subject. They contend that the hearing notice allegedly served and the affidavit of service dated December 5, 2022 are both defective as they were signed and commissioned respectively by incompetent persons.
16. Order 40, rule 7 of the Civil Procedure Rules, provides that any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order. The Applicants have moved the court to set aside the temporary orders of injunction issued because they are dissatisfied with the orders which was given without their participation.
17. In contesting the application, the Plaintiff maintains that there was proper service of summons to enter appearance, plaint and the application upon the Defendants through Whats app web via on his mobile phone. Order 5, rule 22C (1) Civil Procedure Rules provides for Mobile-enabled messaging Applications that,
- “(1) Summons may be sent by mobile-enabled messaging Applications to the defendant's last known and used telephone number.
- (2) Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
- (3) Service shall be deemed to have been effected when mobile-enabled messaging services when the Sender receives a delivery receipt.
- (4) An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the delivery receipt confirming service.”
18. The Plaintiff filed two sets of affidavit of service signed and sworn by Charles Mutiso Mulu. The process server deposed that he served the Defendants with the summons to enter appearance and Plaint on November 9, 2022 while the impugned application was served on December 2, 2022 via the 1st Defendant's telephone number 0722775531. The Defendants/Applicants took issue with date of service indicated on one of the affidavits of service. One such issue is where the process server states,
- “2. That on February 9, 2023, I received copies of plaint, verifying affidavit, list of witnesses, list of documents all dated October 24, 2022 and copies of summons to enter appearance dated November 7, 2022 from the firm of Musyoka Murambi & Associates, Advocates who have the conduct of this matter on behalf of the plaintiff to effect service upon the 1st defendant.”
19. The Plaintiff has explained this as typographical error and annexed copies of screen shots which shows that the service was done on December 2, 2022. I also not that the affidavit of service uploaded on the court portal on December 5, 2022 shows that service of the summons to enter appearance was effected upon the 1st Defendant on December 2, 2022 via whatsapp on a telephone number given. The 1st Defendant has not denied that the number used for service of the impugned documents does not belong to him. In any event, it is the same number used to serve him on January 19, 2023 and which service he has acknowledged receipt.
20. Whether the affidavit of service was commissioned by unqualified person would not change the fact of receipt of service particularly when the proof of service is provided. The screenshots annexed as JPAO-1 in the replying affidavit confirm the 1st Defendant was served on 2nd Defendant 2022. The anomaly of commissioning in this instance can be cured by filing of new affidavits re-stating already existing facts



on service. It was not fatal as is pleaded and submitted by the Defendants. Further, the Defendants ought to have applied to cross-examine the process server to test the veracity of the service.

21. In the case of *Wachira Karani v Bildad Wachira* (2016) eKLR, Mativo J (as he then was) stated thus;

"It is also important to mention that the integrity of the service having been questioned, it was necessary for the process server to be availed and shed light on the issue. Counsel for the applicant raised the issue but never applied to cross-examine the process server. Similarly, counsel for the Respondent did not deem it fit to avail him if at all the service was indeed beyond reproach. The court was denied a golden opportunity to interrogate the issue further when the parties opted to dispose the application by way of written submissions."

22. Can *ex parte* orders and proceedings be set aside even in instances where service is proved? Mulla, The Code of Civil Procedure has illuminated the grounds for setting aside an *ex parte* decree and what constitutes sufficient cause for setting aside an *ex parte* judgement/decree. Essentially, setting aside an *ex parte* judgement is a matter of the discretion of the court. In the instant suit, no *ex parte* judgement has been entered as the matter was at the stage of pre- trial hearing. This infer that the Defendants still had liberty to file their defence and other order 11 documents without necessarily moving this court. Hence, there is no basis to refuse the prayer in the application for leave to file a defence to the claim.

23. The Defendants also asked the court to vary the orders of injunction granted on December 19, 2022 and issued on January 9, 2023 by granting them leave to file a response to the said application. The Plaintiff deposed that they already made an application to the Lands Registry on January 30, 2023 for the registration of the inhibitory order on the suit title Nairobi Block 60/447. While considering the prejudice that may be suffered by the Plaintiff, this court is alive to the provisions of section 3A of the *Civil Procedure Act* that 'Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'

24. In exercising the discretion of setting aside orders, the court has powers to grant the orders on terms that are just. I am guided by this principle which was enunciated in the case of *Patel -v- EA Cargo Handling Services Ltd* (1974) EA 75, which held that:

"There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

25. Taking into consideration that the rules of natural justice requires a party not to be condemned unheard and in exercise of my discretion, I find merit in the application and allow it on the following terms:

- i. The orders of temporary injunction that were confirmed on December 19, 2022 be and are hereby set aside with a rider that the interim orders that



were issued on December 1, 2022 remain in force. For avoidance of doubt the interim orders stated thus;

‘pending hearing and determination of this application, there be and is hereby issued an order of temporary injunction restraining the Defendants from selling, transferring and or in any way disposing of the suit property title no Nairobi Block 60/447 situated in Ngei estate in Nairobi city’

- ii. The Defendants shall file their pleadings including a response to the Plaintiff’s application within 14 days of date of the delivery of this ruling with corresponding leave to the Plaintiff to file supplementary affidavit if need be within 14 days of receipt of the Defendants pleadings.
- iii. The costs of this application shall abide the winner of the application.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2023

A. OMOLLO

JUDGE

