



REPUBLIC OF KENYA



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**Tuva v Mwangovya (Environment & Land Case 314 of 2017)  
[2023] KEELC 19131 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19131 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 314 OF 2017**

**NA MATHEKA, J**

**JULY 25, 2023**

**BETWEEN**

**SAMSON SULUBU TUVA ..... PLAINTIFF**

**AND**

**JOSEPH PAUL MWANGOVYA ..... DEFENDANT**

**RULING**

1. The application is dated December 19, 2022 and is brought under Order 10 Rule 11, Order 40 rule 1, Order 2 Rule 15, Section 3A, IA and 1B of the [Civil Procedure Act](#) Cap. 21 Laws of Kenya seeking the following orders;
  1. This Application be certified as urgent and service thereof be dispensed with and the same be heard ex-parte in the first instance.
  2. An Order of injunction be issued to restrain the Plaintiff/Respondent, whether by himself, his appointees, servants, agents, or advocates or any of them from sub-dividing, advertising for sale, selling, transferring, leasing or in any other way disposing, alienating or dealing with the property known as Plot No. Mombasa/MN/1/9112 pending the hearing and determination of this Application interpartes.
  3. An Order setting aside the Judgment delivered by this Court on February 24, 2021 and the Consequential Decree.
  4. An Order setting aside the Order issued by this Court on May 19, 2021 directing Land Registrar Mombasa to issue provisional Certificate in Respect of Plot No. Mombasa/MN/1/9112, CR. No. 26329 issued in favor of Samson Sulubu Tuva.
  5. An Order revoking the provisional Certificate in Respect of Plot No. Mombasa/MN/1/9112, CR. No. 26329 issued in favor of Samson Sulubu Tuva.



6. An Order directing Land Registrar Mombasa to cancel the provisional Certificate in Respect of Plot No. Mombasa/MN/1/9112, CR. No. 26329 issued in favor of Samson Sulubu Tuva.
  7. An Order directing the Land Registrar, Mombasa to issue a title deed to Plot No. Mombasa/MN/1/9112, CR No. 26329 to the original owner, Joseph Paul Mwangovya unconditionally and without advertisement.
  8. The suit be struck out for being fatally flawed, defective and a nullity.
  9. An Order directing the Plaintiff/Respondent to vacate the suit premises being Plot No. Mombasa/MN/1/9112, CR No. 26329 within seven days
  10. The costs of this Application and of this Suit be awarded to the Defendant/Applicant.
2. It is made on the grounds that the Defendant/Applicant was the registered owner of the property known as Plot No. Mombasa/MN/1/9112 Nyali. On June 20, 2012, the Defendant passed away following a Cardiorespiratory arrest. At the time of his passing, the Defendant/Applicant had employed a lady to stay on the property as a caretaker and ensure that the property was kept in a good habitable condition while he planned to develop the property. At all times, the Defendant had agreed with the caretaker that he would resettle her on an alternative property in Ganze upon embarking on plans to develop the suit property. After the Defendant died, the family of the deceased allowed the caretaker to continue staying on the property as had previously agreed with the Defendant and the family continued paying her a small allowance for upkeep as was the arrangement previously. In 2017, about six years after the death of the Defendant, the Plaintiff herein, an unknown person to the Defendant's family filed the present suit herein claiming adverse possession. At all material times, the Plaintiff was unknown to the registered owner before he passed and was equally unknown to the family and personal representatives of the deceased. At the time of filing the suit, specifically on August 29, 2017, it had been almost 6 years since the Defendant died, having died on June 20, 2012. The suit was however filed against the deceased Defendant in his name. Further, it is evident that the suit was never served upon the Estate or personal representatives of the estate of the deceased. There is an Affidavit of Service on record filed by the Plaintiff sworn by one Shem Otieno Abudho on March 29, 2018 and filed on the same date alleging that the Originating Summons had been personally served on the Defendant on 20<sup>th</sup> February, 2018. However, this cannot have been true since on the alleged date, it had been six years since the Defendant died. This goes to demonstrate that no service of summons nor any other court process was ever effected. Due to the numerous falsified Affidavits of service on record, this matter proceeded ex parte and undefended as the Court was under the impression that service had been effected. Upon the suit proceeding undefended and without knowledge of the family of the deceased, the Plaintiff obtained a judgment dated and delivered on February 24, 2021 in which the Court granted the Plaintiff Orders of Adverse possession as sought in the Originating Summons.
3. In the premises, since the suit proceeded without Notice or service upon the Defendant who has already died and no further notice issued on the deceased's representatives, the judgment was fraudulently obtained and therefore deserving to be set aside. Upon carrying out a search on the suit property recently, the family discovered the fraudulent nature of the activities that the Plaintiff undertook in order to be granted title to the suit property. The family has recently discovered the existence of the present suit, the judgment and the resultant decree granted by this Court. The family has further discovered that the Plaintiff is making frantic attempts to transfer the suit property in order to defeat the deceased family's attempts to recover the suit property. Unless restrained by this Honorable Court, the Plaintiff/Respondent will proceed to irregularly and unlawfully transfer the suit property which he came to ownership through fraudulent, unlawful and irregular means and consequently defeat the Defendant's family's efforts to recover the same.



4. In addition to the above, the Plaintiff's claim for adverse possession has not been proven, the Plaintiff has never stayed on the suit property for a period sufficient to entitle one to orders of Adverse Possession. At all times, the lady who has been staying on the suit property has done so as a paid caretaker and with leave of the registered owner before he died. Therefore, the Plaintiff's claim for Adverse Possession is untenable. To illustrate the extent of the fraud and forgery involved and perpetrated by the Plaintiff in the suit, the firm that filed and conducted the proceedings was the firm of Angelo Owino & Co. Advocates while the firm that was following up on the execution of the decree and other attendant issues was the firm of Paul Kenneth Kinuya & Co. Advocates. Curiously, all these law firms share the same physical address, e-mail and telephone contacts. That the Advocate who prominently appeared for the Plaintiff in these proceedings had been suspended from practice with effect from year 2019 and thus barred from practicing. Therefore, the proceedings were conducted by a suspended lawyer who did not have capacity to practice. It is therefore sufficiently clear that the manner in which this suit was conducted i.e. filed against a Defendant who was already dead, filed and prosecuted by an unqualified advocate and no service having been effected, the judgment was thereafter fraudulently acquired and should therefore be set aside and all the resultant orders and decrees be set aside and the property be returned to the original owner. It is therefore in the interest of justice that the Plaintiff be enjoined from further dealing with the suit property, the judgment set aside, the suit be declared a nullity and consequently struck out and the suit property be reinstated in the name of the Defendant.
5. This court has considered the application and the submissions therein. The Respondent states that there was no appeal in this matter and this is the role of the appellate court. This court has perused the court record and indeed notes that judgment was delivered on 24<sup>th</sup> February 2021. In other words, the Respondent is saying that this court is functus officio having delivered its judgment. This court has further perused the court file and finds that on 20<sup>th</sup> June, 2012, the Defendant passed away following a Cardiorespiratory arrest (the death certificate has been annexed). This suit was filed in 2017. The Plaintiff filed an affidavit of service sworn by one Shem Otieno Abudho on 29<sup>th</sup> March 2018 stating that the Defendant was personally served on the 20<sup>th</sup> February 2018 notwithstanding that the Defendant had died six years earlier.

This *ex parte* Judgment was delivered on 24<sup>th</sup> February 2021 by Justice C.K Yano, who has since been transferred to Chuka ELC. Order 45 Rule 2 of the Civil Procedure Rules provides to whom Applications for review may be made. It provides that;

- (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.
  - (2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.
6. The Court is thus vested with the requisite jurisdiction to determine the Application before it. The jurisdiction of the court to review and set aside its decisions is wide and unfettered. In *Shah vs Mbogo and Another* (1967) EA 116 the Court of Appeal of East Africa held that;

“This discretion (to set aside *ex parte* proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or



error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

7. The provisions of law with regards to setting aside ex parte orders are to be found under Order 12 Rule 7 of the [Civil Procedure Rules](#) provides that;

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

Further the provision is buttressed by Order 51 Rule 15 of the Civil Procedure Rules which provides;

“The court may set aside an order made ex parte”

8. The Court has discretion to set aside or not to set aside an ex parte judgment. Such discretion must be exercised judiciously. However, before the court can set aside its ex-parte decision or proceedings, it is trite law that it must consider whether the Applicant has any Defence which raises triable issues. In [Patel vs East Africa Cargo Handling Services Ltd](#) (1974) EA 75 the court held that;

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

9. The Applicant has contended that the Defendant was never served with the Summons to Enter Appearance and or the Originating Summons and that he had died six years earlier. Order 5 Rule 15 of the [Civil Procedure Rules](#) provides that;

- (1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.

10. In the Affidavits of Service, the said process server states that it is the Plaintiff who pointed out the Defendant in Chonyi, Galanema Village Kilifi County. Clearly, this affidavit of service is mischievous and false. The estate of the Defendant was never served and was not aware of this matter. I find that the Plaintiff was not being truthful and the proceedings in this matter are a nullity. The Respondent states that the Applicant cannot rely on an application and affidavit evidence to prove the death of the Defendant but has not produced any evidence to the contrary. In the absence of proper service, the Court finds and holds that there is no regular judgment on record.

11. Assuming there was a regular Judgment on record, the Court would still be called upon to determine whether there was sufficient cause, whether the Application is brought without undue delay and whether there is a triable Defence on record. The Application was filed on October 26, 2021. However, the Applicant has not stated the exact date that she became aware of the Decree. The Court has perused the supporting affidavit to the application and finds that it raises triable issue as to whether the Plaintiff/ Respondent ever resided on the said suit property. Therefore, this Court finds and holds that the



Applicant has met the threshold for setting aside of the ex parte Judgment, that was delivered by the Court on February 24, 2021. I find for those reasons that this application is merited and I grant the following orders;

1. An Order setting aside the Judgment delivered by the Court on February 24, 2021 and all consequential orders.
2. The Applicant, Maurine Munyazi Mwangovya be substituted to represent the estate of the Defendant.
3. This matter to be heard afresh.
4. Costs of this application to the Defendant/Applicant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25<sup>TH</sup> DAY OF JULY, 2023.**

**N.A. MATHEKA**

**JUDGE**

