



Waswa v Arap Samoi & another; Kenya Commercial Bank (Interested Party) (Environment & Land Case 158 of 2017) [2023] KEELC 18953 (KLR) (25 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18953 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 158 OF 2017
FO NYAGAKA, J
JULY 25, 2023**

BETWEEN

ROBERT JUMA WASWA PLAINTIFF

AND

KIMAIYO ARAP SAMOI 1ST DEFENDANT

EMMANUEL SAMOEI KIPCHUMBA 2ND DEFENDANT

AND

KENYA COMMERCIAL BANK INTERESTED PARTY

RULING

The Application

1. The Interested Party/Applicant moved this court vide its application dated March 22, 2023. It brought it under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 22 Rule 25, Order 51 Rule 1 and 4 of the *Civil Procedure Rules, 2010* laws of Kenya and 'All other enabling provisions of the Law (sic).' The Application sought the following reliefs;
 1. spent.
 2. spent.
 3. That this Honourable Court be pleased to review and or vacate its orders issued on February 27, 2023 declaring the charging of Land Title No Kitale Municipality Block 1/Lessos/1558 in favour of the Interested Party/Applicant herein as illegal, null and void and subsequently directing the said Title be discharged forthwith at the costs of the Chargor and Chargee.
 4. That this Honourable Court be pleased to set aside the orders and proceedings of February 27, 2023 allowing the application dated February 21, 2023 and subsequently, leave be granted to



the Interested Party/Applicant to file a response to the said application and the same be heard de novo.

2. The Application was supported by the Affidavit of Lilian Sogo, the Head Counsel Litigation of the Interested Party/Applicant. The grounds were that on February 28, 2023 this Honourable Court issued orders declaring the charging of land Title No Kitale Municipality Block 1/Lessos/1558 in favour of the Applicant was illegal, null and void. The Court further directed that the aforesaid title be discharged at the costs of the Chargor and Chargee and that the title be deposited with the Deputy Registrar. The Interested Party contends that orders issued were very adverse and prejudicial to it on account of the fact that the suit property is charged as a security to the Interested Party/Applicant for the sum of Kshs 58,500,000/= which sums were advanced to Lano Company Limited, a company associated with the Defendants/Respondents.
3. The Applicant contended further that at the time of charging the said suit property the bank was not aware of any existing suit between the parties herein as a pre-search indicated that the property was unencumbered; and thus the failure of the Applicant to enter appearance and respond to the Application filed by the Respondent was not deliberate but occasioned on improper service of the pleadings which were served upon the Branch Manager of the Applicant in contravention of Order 9 Rule 2(c) of the Civil Procedure Rules.
4. Again, it argued that at the time of the court issuing the impugned orders, the Plaintiff/Respondent had failed to disclose to the Court that the 1st Respondent who is the registered owner and Chargor of the suit property had passed on way back on April 15, 2022 and as such the suit against him had abated; that the interest of the Plaintiff/Respondent on the suit property is a portion measuring 50 x 100 FTS of an acre while the entire parcel of land is almost Twelve (12) acres with extensive developments within it.
5. In support of the Application, the Applicant's Head Counsel Litigation deponed that, they only became aware of the instant suit herein after a court order was issued on February 27, 2023 and served upon its legal department at its headquarters in Nairobi. She annexed a copy of the said court order and marked it as 'LS-1'. She further deponed that the alleged service of the court documents upon the branch manager of the Applicant was not only improper but offends the mandatory provisions of Order 9 Rule 2(c) of the Civil Procedure Rules. She asserts that legally it's either the company secretary or herself who are duly authorized to receive court documents and none of them were served with the court documents.
6. She further contended that the orders issued by this Honourable Court were very adverse and prejudicial to the Applicant who has great interest in the property having charged the suit property to secure the sum of Kshs 58,500,000/= to a company called Lano Company Limited which loan is yet to be repaid. She annexed copies of the title deed, further charge and loan statement and marked them as 'LS-2 (a), (b) and (c) respectively'. She asserted that when the subject property was charged on June 9, 2021 and September 8, 2021 the Applicant was not aware of any court case involving the same and the further all due diligence including conducting of an official search ascertained that the suit property was not encumbered and the pending litigation was not noted in the register. She annexed a copy of the official search and marked it as 'LS-3'. She contended that had the Applicant been aware of the instant suit in relation to the suit property, then it would not have advanced the loan facility nor would they have accepted it as collateral.
7. She further swore that the Charges registered against the suit property were legal, regular and properly registered and the court did not have the benefit of this fact being demonstrated by the Applicant, otherwise it would have assisted the court in reaching a fair and just decision. Consequently, she



deponed, that the court had a duty to protect and safeguard the interest of the Interested Party as a Chargor of the suit property especially where the Charges are legal, valid and properly registered and that they have a good and arguable response to the Notice of Motion application dated February 21, 2023 hence the need to set aside the proceedings and orders of February 27, 2023.

The Response

8. The Application was opposed by way of a Replying Affidavit sworn on March 24, 2023 deposed by the Plaintiff/Respondent. He contended that the Application was incompetent, lacked merit and was only meant to delay the matter and deny the Plaintiff from enjoying the fruits of his judgement.
9. He argued that the Notice of Motion dated February 21, 2023 was duly served upon the Defendants Advocates and the Interested Party herein who even duly acknowledged service by stamping on the principal copy. He annexed a copy of the affidavit of service marked it as 'RJW-1'. He contends that it beat logic for the Applicant to state that service was improper when they duly acknowledged receipt of the court pleadings. Further that the charging of the suit property to the Interested Party after judgment was a ploy by the Defendants to defeat justice. As such the instant application ought to be dismissed with costs.

Submissions

10. The Application was disposed of by way of written submissions. Both the Applicant and the Respondent filed written submissions.
11. In summary the Interested Party argued in their submissions that under Order 5 Rule 3 of the Civil Procedure Rules service of any pleadings including applications upon a corporation ought to be served upon the Secretary, Director and or other Principal Officer of the said corporation. They asserted that in this case the branch manager was not an authorized person under the law to receive service of any pleadings let alone the impugned application. Further there was no attempt by the process server to serve the Secretary, Directors or the Head Counsel litigation who were the persons authorized under seal to receive court documents. Therefore, having effected service upon the branch manager it amounted to improper service. To buttress their point, they relied on the case of *Babs Security Services Limited v Mwarua Yawa Nzao & 19 Others (2019) eKLR.*
12. To this end, they submitted that it was on the basis of the botched service that occasioned the Applicant not file its Replying Affidavit and or participate in the matter and that the same was not deliberate or calculated to defeat the interest of justice. They thus urged that the ex parte orders be set aside and they be granted leave to file their response as the instant application was brought timely and with good faith.
13. In turn the Respondent in their submissions reemphasised the grounds espoused in his Replying Affidavit. He urged that this was an application for dismissal with costs as service upon the Interested Party was properly effected and if at all the branch manager was not authorized to receive service, he would have simply denied to acknowledge receipt.

Issues, Analysis and Disposition

14. The Application seeks review of the orders issued by this Court on February 27, 2023 on the basis of improper service of an application that allegedly gave rise to the impugned orders. I have considered the application, the facts thereof, the law, the submissions by learned counsel and the authorities the parties relied on. I am of the view that two issues lie before me for determination. These are:
 - a. Whether the service of the Notice of Motion dated February 21, 2023 was defective?



- b. Who pays the costs of the Application?

Whether the service of the Notice of Motion dated February 21, 2023 was defective?

15. As a preliminary, judgment in this matter was entered on 26/02/2021 as against the Defendants jointly and severally. Under it, they were ordered to give the Plaintiff/Respondent vacant possession and subsequent transfer of the suit property measuring 50 by 100 which the Respondent had purchased from the Defendants herein. It appears that though the register of the suit land was opened in 2014 the 1st Plaintiff got himself registered on February 26, 2021, the same date of judgment and title to it issued to him on March 12, 2021.
16. Interestingly, and in contempt of court orders, immediately after judgment was delivered the 1st Defendant went ahead and charged the suit property with the Interested Party for the sum of Kshs 50,000,000/=. That was before effecting the transfer of the portion of part of the whole land the Court had found due to the Plaintiff.
17. This precipitated the Plaintiff to file an application seeking inter alia the committal to civil jail of the 2nd Defendant for disobedience of court orders, enjoinder of the Interested Party to the suit and the declaration that the charging of the suit property was illegal, null and void. Directions on service were issued and upon the court being satisfied with service upon the Defendants and the Interested Party gave orders inter alia enjoining the Interested Party into the instant suit but declining the orders for declaration of the charging of the suit property as illegal and or void on account the Interested Party were yet to be enjoined in the suit. It is on the basis of the court orders given on January 30, 2023 enjoining the Interested Party that the impugned Application was filed by the Plaintiff/Respondent seeking the declaration of the charging of the suit property as illegal, null and void.
18. It is trite that the law on service of documents in a corporation is governed by Order 5 Rule 3 of the Civil Procedure Rules 2010 on service upon corporation which provides that;
- ' Subject to any other written law, where the suit is against a corporation the summons may be served - (a) on the secretary, director or other principal officer of the corporation.'
19. I am alive to the fact that Order 5 Rule 3 relates to service of summons upon a corporation. This Court has had occasion before to examine a scenario about service of a hearing notice as compared to summons to enter appearance and pronounced itself in detail. Thus, in *Sifuna & Sifuna Advocates v Patrick Simiyu Khaemba [2021] eKLR* this court established that service of summons also applies mutatis mutandis to service of other court process including Applications by aptly stating that:-
- ' The starting point herein is to point out that whereas Order 5 relates to service of summons, it applies mutatis mutandis to service of other court process, which include Applications and the related documents. This follows a purposive interpretation of the definition of 'document' as given under Order 5 Rule 9(4) which relates to service of documents on the Government. It follows that of service of documents on the government means service of 'writs, notices, pleadings, orders, summonses, warrants and other documents, proceedings and written communications', the rules apply to such documents as the ones in issue in the instant Application.'
20. In terms of Order 5 Rule 5 of the Civil Procedure Rules, it is not in dispute that service upon a corporation ought to be done upon on the Secretary, Director or other Principal Officer of the corporation. Further, it is not issue that service of the Application dated February 21, 2023 was done: indeed, in terms of the Affidavit of Service sworn by Raphael N Simiyu on February 23, 2023 and



supported by the copy of the application annexed to it, service was effected on the Bank Manager of the Kitale Branch of the Interested Party on February 23, 2023 at 11.45 am. This fact was not disputed by Lilian Sogo in her Affidavit sworn on March 22, 2023. However, what was disputed was that the service upon the Branch Manager of the Interested Party was improper and offended the provisions of Order 5 Rule 2 of the Civil Procedure Rules. It was contended particularly, that service ought to have been effected on either the Company Secretary or the deponent of the Supporting Affidavit who was the Head of Counsel of Litigation of the interested party.

21. From the deposition and contention of the said Lilian Sogo, only the Company Secretary was the one who could be served or her. This contention definitely does not accord with the law because it leaves out Directors and Principal Officers of the Interested Party as a corporation as the law requires. The deponent did not give the list of the persons or officers of the corporation who are principal officers thereof. Leaving aside Directors and the Company Secretary she (deponent of the Supporting Affidavit) cannot pretend to convince the Court that she is the only Principal Officer of the corporation. Even then, the officer who was served neither protested nor referred the process server to the Company Secretary or Head Counsel of Litigation for service of the Application. Instead, he accepted without any hesitation. How else could the process server imagine that he had not done service as required by law? Why, other than serving narrow selfish pecuniary interests, is it that the order made on February 27, 2023 being against their interest was the only one that could awaken the Interested Party into action? Most importantly, the Branch Manager who was served with the application in issue did not swear any affidavit to show that he or she did not have authority to receive the said Application delivered.
22. In its submissions, the Interested Party insisted that service of the Application should have been effected physically on the Secretary or the Head Counsel Litigation as the officers duly authorized to receive service. I do not think so. It is clear that Order 5 Rule 3 recognises service of court process on a principal officer of a corporation. In my view a Branch Manager falls within the purview of a principal officer as an officer as defined in Section 2 of the Companies Act as follows;

' Officer in relation to an association or a body corporate includes a director, manager or secretary'.

23. Again, in Bryan A Garner's (2019) Black's Law Dictionary, 11th Edition, Thompson Reuters, St Paul MN, p 1309, a principal officer is defined as 'An officer with the most authority of the officers being considered for some purpose.' Thus, the court, in Ephantus Gathua Muiyuro v Kenya Power & Lighting Company Ltd [2016] eKLR, when faced with a similar scenario aptly held as follows;

' In this case, I am satisfied that there was service of summons received at the defendant/ applicant's Nyeri office by its Regional Manager who has not denied that the summons were received in his/her office. If they were not, nothing would have been simpler than saying so. Whoever received and stamped the said summons in that office must have been authorized to do so. If the defendant/applicant's Regional office at Nyeri has allowed its cleaners or tea girls to receive Court summons and affix its official stamp thereon, then it cannot turn around and deny that there was proper service. The summons having been received by the defendant/applicant's Regional Manager in Nyeri town, there was proper service upon it as contemplated by Order 5 Rule 3 of the Civil Procedure Rules.'



24. Similarly, in *Sammy Njeru v Linear Coach Co Ltd [2005] eKLR*, it was held:

' O V rule 2 (a) requires that service on a corporation be effected 'on the secretary, director or other principal officer of the corporation.' The term 'principal officer' is not defined and, in the absence of a definition or an authority to the contrary, I take the view that the expression includes a manager. I therefore find that the 2nd defendant was properly served through its manager called Peter Mirambo.'

25. Also, in *Roy Mckenzie v Cartrack Kenya Limited & Another [2014] eKLR* the learned judge rendered himself as follows:

' Did such service breach Order 5 rule 3. That Rule provides that service on a Corporation should be effected upon, amongst others, Principal Officers. As correctly submitted by Plaintiff Section 2 of *Companies Act* defines officers to include Managers. Mr Maina was described in the affidavit of service as the Defendant's Manager. That deposition was not contradicted by the Defendants in their affidavit. The service on Mr Maina was therefore in accordance with Order 5 Rule 3.'

26. I am persuaded by the above authorities to hold and determine that the manager of the bank is a principal officer in terms of the *Companies Act* and for the purposes of this suit: such officers are the ones who give the directional decisions of the branches of the Interested Party and the buck stops at them. Therefore, Md Lilian Sogo should not demean such authority wielded by the branch managers just for reason of trying to convince the Court to set aside the orders impugned. I am not persuaded by her contention on that.

27. Since the Branch Manager of the Kitale Branch of the Interested Party was duly served with the Application dated February 21, 2023 it was proper service of the Application . That in my humble view, means that the requirements of Order 5 Rule 3 of the Civil Procedure Rules were met and the argument by the Applicant is neither here nor there.

28. In setting aside ex parte orders, this court must be satisfied with one of two things: either the Applicant was not served with summons and in this case the impugned Application, or that he/it failed to appear in court for the hearing due to a sufficient cause. In the instance case, I have already determined that service of the Application dated February 21, 2023 was proper. The pertinent outstanding question then is whether the Interested Party's non-compliance with respect to filing its Replying Affidavit in due time and non-attendance of court constitutes an excusable mistake or was a deliberate delay of the cause of justice as not to constitute sufficient cause.

29. In *Philip Ongom, Capt vs Catherine Nyero Owota Civil Appeal No 14 of 2001 [2003] UGSC 16* (March 20, 2003) the Court stated thus:

' However, what constitutes 'sufficient cause', to prevent a defendant from appearing in court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case.'

30. Similarly, in the case of *The Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government & Others Civil Appeal No 147 of 2006*, the Court of Appeal of Tanzania while deliberating on what constitutes sufficient cause opined thus:

' It is difficult to attempt to define the meaning of the words 'sufficient cause.' It is generally accepted however, that the words should receive a liberal construction in order to advance



substantial justice, when no negligence, or inaction or want of bona fides, is imputable to the Appellant.'

31. In the instant case, I am of the considered view that the explanation given by the Interested Party for its failure to file its Replying Affidavit is neither reasonable nor excusable since they were indeed served with the Application, and acknowledged receipt by stamping on the principal document but they choose not to respond. They actually, unashamedly, do not attempt to explain the whereabouts of the said Application which was served. Instead, they only elected to rush to court after adverse orders had been issued against them and feigned the lack of proper service in an attempt to steal a match as against the Plaintiff who is yet to enjoy the fruits of his judgment since the year 2021. It is clear that the Interested Party is guilty of indolence, as they willingly choose not pursue the matter diligently despite being served with court pleadings in the matter herein. As such, a court of equity ought not to come to their aid. Besides, and as a by the way observation, I would have not found meritorious the argument that the Interested Party was unaware of the binding judgment of the Court over the suit land which they gladly charged to themselves illegally. I hold so because judgments of the Court are public documents and the Applicant ought to have been aware of the same at all times. It did not exercise proper due diligence. Carrying out an official search and obtaining a certificate thereto was not the only due diligence that was required of the Interested Party. Had they gone to the ground and inquired of the position of the suit land, they ought to have discovered that indeed the same had been a matter of a protracted suit and that the Plaintiff was actually entitled to possession and ownership. With that I doubt if they would have charged the property unless they formed part of the scheme to dispossess of the Plaintiff his rightful ownership of the land is issue.
32. Since orders of the Court are not issued in vain, the Applicants ought to obey the orders of the Court as issued earlier on in this matter. They have the liberty to charge again the remainder of the property after they have released the portion due to the Plaintiff/ Decree Holder.
33. The upshot of this is that the Application dated March 22, 2023 lack merits and is hereby dismissed.

Who bears the cost of the Application?

34. It is clear that the prayers the Applicant sought failed. Since costs follow the event, the Interested Party/ Applicant shall bear the costs of the instant dismissed application.
35. Orders accordingly.

RULING DELIVERED, DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 25TH DAY OF JULY, 2023

HON DR IUR FRED NYAGAKA

JUDGE

