



**Mumbo & another (Being the Representative of Jamhuri Jua Kali Investment Group) v Khakame; Chief Land Registrar (Interested Party) (Environment & Land Case E007 of 2023) [2023] KEELC 20345 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20345 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E007 OF 2023  
JA MOGENI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**ELLY ODHIAMBO MUMBO & CHRISTOPHER OKOTH (BEING THE REPRESENTATIVE OF JAMHURI JUA KALI INVESTMENT GROUP) ..... PLAINTIFF**

**AND**

**CAROLINE KHAKAME ..... DEFENDANT**

**AND**

**CHIEF LAND REGISTRAR ..... INTERESTED PARTY**

**RULING**

1. The Applicant filed a Notice of Motion dated 27/03/2023 seeking the following orders;
  1. Spent
  2. Spent
  3. That this Honorable Court be pleased to stay and/or vary orders issued on 15<sup>th</sup> February 2023 pending the hearing and determination of this Application inter partes
  4. That this Honorable Court be pleased to order immediate cross-examination of the process server Edward Njuguna on his affidavits of service dated 18/1/2023 and 8/02/2023
  5. That this Honorable Court be pleased to find that the purported service of the plaintiff's application 7/01/2023 and subsequent orders was defective and improper



6. That this Honorable Court be pleased to stay, review, lift and/or set aside the orders issued on 15<sup>th</sup> February, 2023 in the interim pending hearing and determination of Plaintiff's Application dated 9<sup>th</sup> January, 2023.
  7. That upon the said *ex parte* proceedings and the Ex Parte Orders being set aside and vacated, the Defendant be granted leave to file a Response and oppose the said Application .
  8. That this Honorable Court be pleased to grant such further or better orders as will meet the ends of justice.
2. The Application is anchored on the grounds provided on the face of the application and a supporting affidavit sworn by the Applicant on the even date. I see no reason for repeating the grounds here.
  3. The Application is opposed by the Respondent through his Replying Affidavit dated 6/04/2023 wherein the Respondent avers that the Applicant is mischievous when he states that she was not served with the application by the process server. This is so because according to him the applicant was served by the process server on 24/01/2023 who has filed an affidavit sworn on 8/02/2023 stating clearly how he served the applicant herein.
  4. The affidavit of service has attached the copy of the print out o the true caller showing two ticks and the name Caroline Khakame on the call log including the message sent to the said Caroline showing that there shall be a hearing of the Notice of Motion Application dated 9/01/2023. There are two ticks on the whatsapp messages.
  5. It is the Respondent's contention that the applicant was accorded an opportunity to be heard in line with the principles of natural justice but she failed to respond to the application.
  6. The Respondent states that the Applicant has deliberately misled the court in claiming that the respondent is not in occupation of the suit property since he alleges that they have constructed several shops and they operate a garage on the suit premises which in his application dated 9/01/2023 he attached photographs of the alleged members of the plaintiff at their different work stations.
  7. The Respondent contends that the Applicant has not shown cogent reasons why the court orders should be set aside nor to warrant the orders sought in her application.
  8. The Respondent contends that the Applicant is a very malicious person who has been using her husband's powers who is a police officer to frustrate the respondent and its members. They attached a copy of the OB obtained from Jamhuri Police Station where they allegedly reported the said harassment on 22/11/2021. Further that the matter is scheduled for a pre-trial on 9/05/2023 and so the respondent prays that the application be dismissed. The events for pre-trial date has since been overtaken by events.
  9. The application was canvassed by way of written submissions and the parties filed their respective submissions which I have considered. The Plaintiff's written submissions are dated 22/06/2023 and the Defendants /Applicant's submissions are dated 19/06/2023.

### **Background of the Case**

10. In order to put this matter into perspective it is necessary to give a background of the entire suit more specifically the proceedings thus far before delving into the issues raised in the Applicant's Application.
11. The Plaintiffs/ Respondents herein filed this suit vide a plaint on 9/01/2023 seeking an order of permanent injunction restraining the defendant, his agents, employees and servants from trespassing upon, evicting, alienating, disposing or in any manner be restrained from any dealings on all the parcel



of land known as Nairobi Block 63/742 and a declaration that the plaintiffs and others not before the court are the rightful owners of the suit property, Plot number Nairobi Block 63/742 along Ngong Road. eviction against the Defendant from the deceased's land parcel no. 9346/2. The Plaintiff also filed a Notice of Motion under certificate of urgency on the same day seeking that;

- a. The application be certified as urgent and be heard *ex-parte* in the first instance.
  - b. That a temporary injunction do issue restraining the Defendant, its agents, officers or persons acting through them from trespassing selling transferring, disposing off encumbering, or perfecting any transaction or in any other way dealing with the Plaintiff's parcel of land registered as Plot Number Nairobi Block 63/742 Along Ngong Road, herein referred as the "Suit Properties" situate in Nairobi County, pending the hearing and determination of this application.
  - c. That a temporary injunction do issue restraining the Defendant, its agents, officers or persons acting through them from trespassing selling transferring, disposing off encumbering, or perfecting any transaction or in any other way dealing with the Plaintiff's parcel of land registered as Plot Number Nairobi Block 63/742 Along Ngong Road, herein referred as the "Suit Properties" situate in Nairobi County, pending the hearing and determination of this suit.
  - d. That a temporary injunction directed at the Defendant, its agents, servants, employees and any person acting through them compelling them to vacate the Plaintiffs' parcel of land registered as Plot Number Nairobi Block 63/742 Along Ngong Road, herein referred as the "Suit Properties" situate in Nairobi County pending the hearing of this application.
  - e. That an Order directing the Officer Commanding Police Division Jamhuri Police Station to ensure that the Orders issued by the Honorable Court are obeyed and to provide assistance in the evictions should the Defendants, its agents, employees and any person acting through them fail to vacate the suit property that is to say the parcel of land registered as Plot Number Nairobi Block 63/742 Along Ngong Road, herein referred as the "Suit Properties" situate in Nairobi County.
  - f. That the Honorable Court be pleased to issue any other relief or order that it deems fit.
  - g. That costs of this application be borne by the Defendant/ Respondent.
12. The aforesaid application was presented before me on 23/01/2023. I directed the same to be served upon the Applicant herein in person and the Interested Party and that it be fixed for Inter partes hearing on 15/02/2023 but the applicant was not present and as such I proceeded to allow the Application in terms of prayers 2 and 3 of the Notice of Motion.
13. On 27/03/2023 Respondent/Applicant filed another Application under Certificate of Urgency seeking to set aside/and or vary orders issued on 15/02/2023. The Application was placed before me on 14/06/2023 and after perusing it I gave directions on the disposal of the same since the applicant had served the plaintiff/respondent. The parties agreed to canvass the application by way of written submissions.

### **Issues for Determination**

14. I have considered the pleadings, Notice of Motion and rival submissions. The plaintiff/respondent contends that the applicants have not shown that they have discovered new and important evidence as provided in Order 45. They have relied on *Grace Akinyi v Gladys Kemunto Obiri & Another* [2016]



eKLR, *Hosea Nyandika Mosagwe & 2 others v County Government of Nyamira* [2022] eKLR. He stated that the review application was brought to court after a long delay because the order was issued on 22/02/2023 and the application was brought to court on 27/03/2023.

15. The defendant on their part submitted that there was improper service and that they would want the process server called in for cross-examination. That the number quoted on the affidavit of service 0704xxx545 did not belong to the defendant/applicant. They submitted that given that there was improper service the ex parte order should be set aside. They relied on among others *William Ntomauta M'etbanga sued as M'Mauta Nkari v Baikimaba Kirimaria* [2017]eKLR, *Captain Philip Ongom v Catherin Ngeno Owaota* SCCA 14/2/2001 [2003] UGSC 16.
16. The defendant/applicant submitted that they seek to have the ex parte order to be set aside and in reference to the case of *Muchanga Investments Ltd v Safaris Unlimited (Africa) Limited & 2 Others* CA No. 25 of 2002 (2009) eKLR 229 he stated that the court should find that the grounds of opposition are lacking merit and should be dismissed with costs.

### Analysis and Determination

17. I have considered the pleadings and the singular issue for determination is whether the Applicant is entitled to a stay and setting aside of the orders of this court issued on 15/02/2023.
18. Essentially, setting aside an ex parte order is a matter of the discretion of the court. In the case of *Esther Wamaitha Njibia & two others v. Safaricom Ltd*[2014] eKLR the court citing relevant cases on the issue held inter alia: -

“the discretion is free and the main concern of the courts is to do justice to the parties before it (see *Patel v E.A. Cargo Handling Services Ltd*. The discretion is intended 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see *Shah v. Mbogo*). The nature of the action should be considered, the defense if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration v Gasyali*. It also goes without saying that the reason for failure to attend should be considered.”

19. In the case of *Captain Philip Ongom v Catherine Nyero Owota* SCCA [*supra*] the court held inter alia that the court must be satisfied about one of the two things namely: -
  - a. either that the defendant was not properly served with summons;
  - b. or that the defendant failed to appear in court at the hearing due to sufficient cause.
20. It is important for me to mention that in the above case, the court defined what constitutes sufficient cause and in this respect the following paragraph is relevant to the issues before me: -

“Once the defendant satisfies the court on either, the court is under a duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. 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”.



21. From the foregoing therefore can it be said that the Applicant herein has demonstrated that there was a sufficient cause why she failed to enter appearance and respond to the Application whose order she seeks to set aside?
22. The Applicant raises improper service as the reason why she never entered Appearance or attended court for the hearing of the application. Improper service is a 'sufficient cause' that can if proved by the Applicant, compel me to set aside the orders. This is because I believe that it is not sufficient for a Plaintiff to institute suit against a party, that party must be invited to submit to the authority of the court in order for the legal process to commence. The Summons must be served in the manner provided for in the *Civil Procedure Rules* to enable the defendant to submit to the jurisdiction of this court. The Defendant's knowledge of the existence of the suit is not sufficient to proceed against him or her. He may be aware of the suit but unless they are prompted by the summons in the manner provided for in the *Civil Procedure Rules*, 2010, the jurisdiction of this court is not invoked and therefore they may choose not to appear or respond to the suit.
23. In the instant suit the Applicant alleges that she was not personally served with the summons and pleadings and Hearing Notice for 23/01/2023 nor the mention for 15/02/2023 and thus could not enter appearance and respond effectively to the application. She contends that the allegations in the Affidavit of Service sworn by one Edward Njuguna, a Process Server on 18/01/2023 and 8/02/2023 are not true since he has never communicated with her. She avers that the telephone number quoted on the affidavits of service does not belong to her but that the number 0704451545 belongs to one Mercy Njambi. Further that the said Affidavits of Service have not confirmed the delivery of the summons and pleadings and that if at all there was any communication or service which is denied, then the same was done without her consent or knowledge.
24. In response to the above averments by the Applicant the Respondents averred that the Applicant was served on 24/01/2023 as stated by the Process Server Mr Edward Njuguna and any assertions to the contrary are false and misleading. That the applicant is seeking empathy from the court having failed to attend court.
25. The general practice has always been that service must be effected personally. Where it is impossible to effect personal service, the courts usually grant leave to the person who is supposed to effect service upon a party by way of substituted service after it is satisfied that service of summons cannot be served in the ordinary way.
26. However, through Legal Notice No. 22 dated 26/02/2020, the *Civil Procedure Rules*, 2010 were amended and amongst the new provisions introduced were rules regarding mode of service provided for under Order 5 of the *rules*. Specifically, Order 5, rule 22B and Order 5, rule 22C which rules have introduced other modes of service other than the traditional physical service.
27. Order 5, rule 22B provides as follows;
  1. Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.
  2. Service shall be deemed to have been effected when the Sender receives a delivery receipt.
  3. Summons shall be deemed to have been 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.



4. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.
28. Order 5, rule 22C provides 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.
29. The question that I need to determine is whether the respondent met all the conditions set out in the rules of service in person and aforementioned new rules. In their response to the Application, the plaintiff/respondents have pointed this court to an Affidavit of Service sworn by a Process Server, one Edward Njuguna 18/01/2023 and 8/02/2023. In the Affidavit of service, the process server averred that he served the respondent/applicant vide whatsapp the telephone number 0704451545 but the defendant categorically states it is does not belong to her.
30. One thing that stands out is that the Applicant deny that, the telephone number used by the Process Server is not hers.
31. The provisions for service via whatsapp are only concerned with the sender receiving a delivery receipt. Therefore, once it is confirmed that the platforms used are the defendant's last known and used platforms, the challenge will only be ensuring he or she (the Plaintiff) gets a delivery receipt.
32. For whatsapp it is common knowledge that delivery in most cases is confirmed by double ticks which turn blue immediately the recipient views the message sent. The Respondents have attached a document showing a screenshot message sent to the number that the process server has stated was provided to him by the respondents. In the affidavit of service of 8/02/2023 the process server used the same number to call and then serve the applicant in person at Kencom.
33. The Applicant has indicated that she wanted her Advocate to call the Process Server for cross examination with a view of proving that his allegations were not true. This is part of the prayers made in the application dated 27/03/2023.
34. The respondent has stated that the applicant is not truthful and that she was properly served.
35. I have also noted that the applicant alleges that the said number which the respondent claims to belong to her belongs to somebody else who however is not a party to this application. There is no way of establishing that indeed that number belongs to the stated owner one Mercy Njambi especially the fact that there is no attachment from the service provider to attest to the ownership of the said line 0704XXX545 to authenticate who is the owner of the said telephone line .
36. From the foregoing, I do not find any reason to doubt that the Respondent/Applicant was properly served by the Plaintiff/Respondent in accordance with the provisions of Order 5, rule 22C of the [Civil Procedure \(Amendment\) Rules, 2020](#).



37. The upshot is that the application lacks merit and I dismiss it with costs to the Respondents.  
It is Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023.**

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**MOGENI J**

**JUDGE**

