



**Laboso v Sirorei (Environment & Land Case 109 of 2021)
[2023] KEELC 19995 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19995 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 109 OF 2021
MN MWANYALE, J
SEPTEMBER 21, 2023
(FORMERLY ELDORET ELC CASE NO 99 OF 2020)**

BETWEEN

RICHARD KIPKEMBOI LABOSO PLAINTIFF

AND

RAEL JERONO SIROREI ALIAS RAE L JERONO YEGON DEFENDANT

RULING

1. Vide an application dated 27/4/2023 Rael Cheronon Yegon the Defendant now Applicant seeks the substantive order of setting aside Judgment entered against her and she be granted a hearing in the case.
2. The prayer for stay of execution of the judgment and resultant decree having been substituted thereof with an order of maintenance of status quo on the land register of Nandio/Kurgung/870.
3. The Applicant further seeks an order that she be allowed to file a replying affidavit in response to the originating summons, and the replying affidavit be deemed duly property filed upon payment of requisite Court fees.
4. The grounds in support of the application inter alia include the property never belonged to the Defendant Applicant, as the same has been distributed by the High Court, through a succession cause before the High Court in Eldoret.
5. That as a result the judgment was obtained by misrepresentation.
6. That there exist an earlier Court decree vesting the land to third parties.
7. Defendant was not served with the suit papers prior to the hearing and it would be fair and just that the Defendant be given allowance to be heard.



8. In the supporting affidavit of the Applicant, Rael Cheron Yegon she has annexed copies of succession cause No. 34/2008, as well as an order dated 16/2/2015, pleadings in Eldoret Succession Cause No. 109/2021 as well as treatment notes showing that the Applicant was sick on 17/8/2021.
9. On the strength of the above the Applicant seeks the substantive order set out paragraph 1 of this ruling.
10. Before the application was heard and determined, the Defendant/Applicant yet again filed an application dated 9/6/2023 which was sought to amend the application dated 27/4/2023 but which application was later on withdrawn.
11. The decree holder/Respondent only filed a replying affidavit deponed on 13th June 2023 in opposition to the withdrawn application, but there is no replying affidavit in respect of the substantive application subject of this ruling on the Court record.
12. Parties were directed to file submissions on the application. Even though the application dated 27/4/2023 is technically unopposed there being no replying affidavit in opposition to the application on the Court record, the application shall be subjected to a merit evaluation to determine whether the same is meritorious. It is to be noted that the decree holder/Respondent filed submissions in respect of the application subject of this Ruling.

Applicant's Submissions:

13. The Applicant submits making a distinction between irregular and regular judgment and has cited the decision in the case of *James Kanyitta Nderitu and Another* (2016) eKLR.
14. The Applicant submits that as the Court found that service of summons was properly served on the Applicants, the impugned judgment was thus a regular judgment and the Court must determine whether or not the Applicants have given a justifiable cause for non attendance and/or whether their defence raises any triable issues. In this regard the Applicant cites the decision in *Patel vs E. SA. Cargo handling services Limited* 1974 E. A. 75.
15. The Defendant/ Applicant submits that the defence (Replying Affidavit) raises triable issues including the issue of whether or not a sale occurred.
16. The Defendant further submits that she had offered an explanation for non-attendance and urges the Court to find in her favour and allow the application.

Respondent's Submission: -

17. The Respondent submits, that the exercise of discretion in favour of the Applicant so as to set aside the judgment delivered on July 19, 2022 should be guided by the decision in *Shah vs Mbogo* (1967) E. A. 166.
18. The Respondent submits that the decree herein was executed and a title issued to the Respondent. That the suit herein was purely on adverse possession and the Plaintiff/Respondent entered into an agreement for sale on 19/01/2007 and took possession in 2007, and he did not conceal any relevant information.
19. The Respondent submits citing the case in *Ibrahim Mungara Mwangi vs Ndegwa Mwanzi* (2014 eKLR) that the Applicant was indolent and is not deserving of the discretion.



20. The Respondent submits that the Replying affidavit has no real prospect of success which means that the test must be better than merely arguable. In support of this definition the Respondent cites the decision in *International Finance Corporation vs Uteaxfrica* (spril) 2000 as 136).
21. The Respondents submits that the entire case was premised on adverse possession and not on succession or the purchase and on the strength of the said submissions, the Respondent argues the Court to find the application without merit and dismiss the same.

Issues for Determination: -

22. Having analyzed the application the affidavit and rival submissions of the parties, the Court frames the following issues for determination;
 - i) whether the application is merited or not
 - ii) whether the reliefs sought ought to be granted

Analysis and Determination: -

23. Whilst on the one hand the Applicant concedes that the judgment is a regular one, on the other hand, the same Applicant submits that there was no service of the Originating Summons on her. At paragraph 17 of her Replying Affidavit, she depones that on the dates of the service upon her, she was hospitalized and has annexed annexure RC5, copies of medical records. The medical records annexure RC5 reveal at the bottom of the page the medial records are dated 17/8/2021. Whilst the Affidavit of Moses Osundwa Shikanda, a Court Process server employed by this Court deponed on January 3, 2022, reveal that the date of the service of the originating summons and affidavit in support was effected on 2December 4, 2021. It is not true that the service was effected on a date that the Applicant was hospitalized, consequently as the Court had found proper service of the originating summons, the judgment herein was a regular judgment and the setting aside of the same ought to be done in the principles set out in *Shah vs Mbogo E. A.*
24. I have looked at the Replying Affidavit in opposition of the Originating Summons, the same does not address the issue of occupation by the Respondent but it denies the agreement for sale, the basis for entry and occupation by the Respondent.
25. Having demonstrated one arguable issue, the Court thus finds that the Defendant ought to be granted leave to defend the suit, and the judgment herein is set aside, on conditions that the Defendant files the Replying Affidavit to the Originating Summons within 14 days from today, and to pay costs assessed at Kshs 20,000/=, within the said 14 days.
26. This Court having already dealt with the issue of adverse possession and having rendered its judgment which it had now set aside hereby transfers the suit for hearing and determination before the Environment and Land Court at Eldoret.
27. The Deputy Registrar of this Court to facilitate the transfer and parties to appear before the Environment and Land Court 1 at Eldoret on October 5, 2023 for further directions before that Court.

DATED AND DELIVERED AT KAPSABET THIS 21ST DAY OF SEPTEMBER, 2023.

HON. M. N. MWANYALE,

JUDGE.

In the presence of;



Mr. Wainana holding brief for Mr. Momanyi for the Plaintiff/Respondent

Ms. Nyabonye holding brief for Mr. Metto

