



**Mwangi v Mwangi & another (Environment & Land Case
308 of 2008) [2023] KEELC 21086 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21086 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 308 OF 2008
OA ANGOTE, J
OCTOBER 26, 2023**

BETWEEN

MARGARET W GATIBARU MWANGI PLAINTIFF

AND

JOHNSON MURIITHI MWANGI 1ST DEFENDANT

NAIROBI CITY COUNCIL 2ND DEFENDANT

RULING

1. Before the Court for determination is the 1st Defendant's Notice of Motion dated 30th March 2022 and brought under Sections 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act*, Order 10 Rules 4, 10 and 11 and Order 51 Rule 1 of the *Civil Procedure Rules*. The 1st Defendant is seeking for orders that:
 - a. The ex-parte judgement and the consequential decree on record against the 1st Defendant together with all other consequential and subsequent orders, notices and other process arising therefrom be set aside.
 - b. The 1st Defendant be granted leave to file and serve his Memorandum of Appearance and statement of Defence and that the draft statement of Defence attached hereto be deemed as properly filed and be served upon the Plaintiff.
 - c. That an order be and is hereby issued forthwith restraining the Plaintiff by herself, her servants, agents and/or anyone acting through her or for her from entering, trespassing, constructing or in any other way interfering with the 1st Defendant's quiet possession and ownership, occupation of plot NO. A 16 Sector 1 Umoja Innercore, Nairobi (hereinafter the 'suit property') pending the hearing and determination of this suit.
 - d. The costs of the application be provided for.



2. The application is based on several grounds and supported by an affidavit sworn by the 1st Defendant. The 1st Defendant deponed that he is the owner of the suit property and the adjacent property (Plot No. B16 Sector Umoja Innercore, Nairobi).
3. It was the deposition of the 1st Defendant that he constructed rentals on the two properties without interference from anyone; that sometime in March 2022, he received a letter asking his tenants to vacate and that he was shocked to find out that this suit had been filed against him and proceeded to conclusion without his knowledge.
4. According to the 1st Defendant, he was never served with a demand and intention to sue, summons to enter appearance, pleadings or Notice for Court appearances; that he had no brother named Ndegwa and the said Ndegwa does not reside on the suit property and that he was never served with the documents as claimed in the affidavit.
5. Additionally, the 1st Defendant stated that the process server allegedly served him with summons and a Plaint from M/S Wachira Mburu Mwangi & Co. Advocates while the Court record shows that M/S Njeru Nyaga & Co Advocates acted for the Plaintiff in the matter from the start to the end.
6. In conclusion, the 1st Defendant urged the Court to restrain the Plaintiff from dealing with the suit property, set aside the judgement and decree issued in his absence and allow the case to be heard on merit.
7. The Plaintiff filed an affidavit sworn by Esther Gathoni Gatibaru, the Plaintiff's authorized attorney, who deponed that the 1st Defendant was duly served with the Memorandum of Appearance and Plaint. The deponent further stated that the issue of M/S Wachira Mburu Mwangi & Co. Advocates was a typing error as the impugned affidavit of service shows that it was drawn by Njeru Nyaga & Co. Advocates.
8. The Plaintiff deponed that the 1st Defendant has no prima facie case as his claim of ownership of the suit property cannot be substantiated; that the suit property belongs to the Plaintiff to whom it was allotted on 8th October 1979 and that the 1st Defendant on the other hand had failed to defend his case when he was given the opportunity to do so.

Submissions

9. Relying on Order 5 Rule 8(1) of the [Civil Procedure Rules](#) and the cases of [James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another](#) [2016] eKLR and [Frigonken Limited vs Value Pak Food Limited](#) [2011] eKLR, the 1st Defendant submitted that the judgement entered on 11th April 2017 was irregular and should be set aside *ex debito justitiae*.
10. It was submitted by the 1st Defendant's counsel that the Judgement was entered ex-parte; that the 1st Defendant was not properly served with the requisite documents to enable him participate in the suit and that his non-appearance was therefore through no fault of his own.
11. Relying on the case of [Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono](#) [2015] eKLR, the 1st Defendant's counsel stated that the 1st Defendant has a Defence that raises a triable issue and that he has attached ownership documents to the draft Defence.
12. The 1st Defendant submitted that he had established a *prima facie* case with a probability of success as he had attached a Defence raising triable issues as well as documents supporting his ownership claims.



13. It was submitted that the 1st Defendant would suffer irreparable injury if an injunction is not granted as he has extensively developed the suit property and that the balance of convenience tilts in his favour. The case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* [2018] eKLR was relied upon.
14. The Plaintiff's counsel submitted that the 1st Defendant could not claim the defence of inadvertence as he had been properly served with summons to enter appearance and his current application is aimed at delaying justice.
15. The Plaintiff's counsel submitted that the draft Defence does not raise triable issues because the Plaintiff was allotted the suit property on 8th October 1979 and that the 1st Defendant had not exhibited a sale agreement despite stating that he had bought the suit property from a third party.
16. The Plaintiff's counsel submitted that the 1st Defendant has no prima facie case as he has no right over the suit property which belongs to the Plaintiff. It was submitted that it is fifteen years since the suit was filed and the Plaintiff should enjoy the fruits of her judgement.

Analysis and Determination

17. Based on the foregoing, the following three issues arise for determination:
 - i. Whether the ex-parte judgement issued on 11th April 2017 should be set aside.
 - ii. Whether the 1st Defendant should be allowed to file his draft defence out of time.
 - iii. Whether an injunction should be issued.
18. The 1st Defendant has argued that the ex-parte judgement should be set aside as it was irregularly issued. It is the 1st Defendant's case that he was not duly served with the documents that would have allowed him to participate in the proceedings. The Plaintiff has denied this position stating that the 1st Defendant was duly served with the summons to enter appearance.
19. Order 12 Rule 7 of the *Civil Procedure Rules* provides as follows:

“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.”
20. The Court of Appeal in the case of *CMC Holdings Ltd vs James Mumo Nzioki* [2004] eKLR stated as follows concerning the discretion of the court to set aside ex-parte orders:

“In the case of *Shah vs Mbogo & Another* [1967] EA 116 decided by the High Court of Kenya at Nairobi it was held inter alia as follows:-

“(iv) Applying the principle that the Courts discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause by justice, the motion should be refused”.

The above was upheld by the Court of Appeal in its decision in *Mbogo & Another vs Shah* [1968] EA 93. Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such a discretion if the Court turns its



back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle.”

21. In view of the law as set out above, I am convinced that in the instant case, the 1st Defendant has demonstrated an excusable mistake that would warrant the Court to exercise its discretion in his favour.
22. The 1st Defendant has demonstrated on a balance of probabilities that he did not enter appearance and defend the suit because he was not duly served with the Plaint and Summons to Enter appearance. The veracity of the affidavit of service has been called into question by the 1st Defendant.
23. According to the 1st Defendant, he has no brother named Ndegwa who purportedly introduced the process server to him. Indeed, it is the finding of the court that the fact of whether the 1st Defendant has a brother named Ndegwa has neither been proved nor disproved and is therefore presumed as disproved.
24. Since the fact of service on the 1st Defendant is hinged on the existence of such a brother who purportedly introduced the process server to the 1st Defendant during service of the Summons, it is the finding of the court that the issue of the process server having served the 1st Defendant was not proved.
25. Further, the Plaintiff has not denied the 1st Defendant’s allegations that the affidavit of service provides that the documents to be served originated from a law firm different from that which represented the Plaintiff in the proceedings.
26. Despite the Plaintiff’s explanation that that was a typographical error, I am persuaded that it casts further doubt on the veracity of the impugned affidavit.
27. In view of the foregoing, I am convinced that on a balance of probabilities, the 1st Defendant was not served with summons to enter appearance. That being the case, the ex parte Judgment should be set aside *ex debito justitiae*.
28. The next issue for determination is whether an injunction should issue pending the hearing of the suit. The conditions for the grant of a temporary injunction were set out as follows in the case of *Giella vs Cassman Brown & Co Ltd* [1973] EA 358:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

29. In the case of *Mrao Limited vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, the Court of Appeal defined a *prima facie* case as follows:

“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”



30. The 1st Defendant has claimed that he owns the suit property on which he has put up rental houses. The 1st Defendant has also produced in evidence a Lease Agreement between him and the then City Commission of Nairobi dated 5th October, 1995 for land known as A. 16 Sector One.
31. The 1st Defendant has also annexed photos showing the permanent structures that he has built purportedly on the suit property. Whether the structures stand on the suit property, or on the land that the 1st Defendant claims to be his can only be determined after trial. Suffice to say that the prevailing status quo by way of an injunction should issue to preserve the structures on the land.
32. In view of the foregoing, the application dated 30th March, 2022 is allowed as follows:
- a. The ex-parte judgement and the consequential decree on record against the 1st Defendant together with all other consequential and subsequent orders, notices and other process arising therefrom be and are hereby set aside.
 - b. The 1st Defendant be and is hereby granted leave to file and serve his Memorandum of Appearance and statement of Defence out of time, and in any event within 14 days of the date of this Ruling.
 - c. That an order be and is hereby issued forthwith restraining the Plaintiff by herself, her servants, agents and/or anyone acting through her or for her from entering, trespassing, constructing or in any other way interfering with the 1st Defendant's quiet possession and ownership, occupation of plot NO. A 16 Sector 1 Umoja Innercore, Nairobi pending the hearing and determination of this suit.
 - d. In view of the age of this matter, the same to be set down for hearing within 90 days of the date of this Ruling.
 - e. Each party to bear his/her own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF OCTOBER, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Njeru for Plaintiff/Respondent

Ms Muthoni Mwangi for Karara for 1st Defendant

Court Assistant - Tracy

