**Omollo v City Council of Nairobi & 2 others (Environment & Land Case 1082 of 2004) [2023] KEELC 21783 (KLR) (21 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21783 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT & LAND CASE 1082 OF 2004**

**JA MOGENI, J**

**NOVEMBER 21, 2023**

**BETWEEN**

**MARY E OMOLLO ..... PLAINTIFF**

**AND**

**THE CITY COUNCIL OF NAIROBI ..... 1ST DEFENDANT**

**DONALD MBUGUA MUGO ..... 2ND DEFENDANT**

**THE REGISTRAR OF TITLES ..... 3RD DEFENDANT**

**RULING**

1. At the outset it is important to note that the 2nd defendant/applicant Donald Mbugua Mugo is now deceased.

2. I have taken note of the fact that one of the prayers in the application dated 11/07/2023 is for the Court to determine the substitution of the deceased by one LILLY ENID KAARI MUGO who has attached document "DMM1" which is a confirmation of grant to Lilly Enid Kaari Mugo as the administratix dated 4/09/2013 vesting powers to her regarding the estate of the deceased.

3. I take it therefore that I have to obviously deal with and determine the substitution prayer for the deceased with the applicant first before I make any determination on the application. It would be an exercise in futility to proceed and analyse the application without having made the substitution with the person who has filed the application in court. In exercise of its inherent powers and taking into consideration the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act* CAP 21 as read with Section 3 of the *Environment and Land Court Act* 2015 (2011) (The ELC Act) to 'breathe' life to suits in order to meet the furtherance of the ends of justice this court therefore, substitutes Donald Mbogo Mugo with Lilly Enid Kaari Mugo suing in her capacity as the personal representative of the estate of the deceased as observed in Rajesh Pranjivan Chudasama vs Sailesh Pranjivan Chudasama (2014) eKLR and Morjaria Case (1984) KLR 420, among other authoritative pronouncements.

4. I am also accordingly guided by Article 159 (2) (d) of *the Constitution* of Kenya, 2010 (*the Constitution* herein) and the findings of the Court of Appeal in Civil Application No. 173 of 2010 Abdirahman Abdi v Safi Petroleum Products Ltd & 6 others [2011] eKLR.

5. Having disposed of the substitution issue I now turn to the application filed before this court dated 11/07/2023 seeking the following orders;

    a. Spent

    b. Spent

    c. That pending the hearing and determination of this application inter partes the Honorable Court be pleased to issue an order for stay of execution of the judgment delivered on 17th May 2019 and all consequential orders arising therefrom.

    d. That pending the hearing and determination of the application inter partes the Honorable Court be pleased to set aside the judgment and subsequent decree issued in this case on 17th May 2019 and all consequential orders arising therefrom.

    e. That pending the hearing and determination of this application inter partes the Honorable court be pleased to allow LILLY ENID KAARI MUGO to be substituted in this suit in place of the deceased 2nd defendant – Donald Mbogo Mugo.

    f. That pending the hearing and determination of this application interpartes the honorable court be pleased to issue an order for stay of execution of the judgment delivered on 17th May 2019 and all consequential orders arising therefrom.

    g. That pending the hearing and determination of this application inter partes the honorable be pleased to set aside the judgment and subsequent decree issued in this case on 17th May 2019 and all consequential orders arising there from.

    h. That this honorable court be pleased to reopen this case and allow the 2nd defendant to defendant through his legal representative to represent him in this case.

        i. That this Honorable Court be pleased to grant such orders as may be equitable in the circumstances of this case.

    j. That costs of this Application be provided for.

6. The Application is grounded on Article 159 2 (d) of *the Constitution*, Sections 3 and 3A of the *Civil Procedure Act*, Under Order 10 Rule 11, Order 12 Rule 7, Order 24 Rule 4, and Order 51 Rule 1of the Civil Procedure Rules 2010.

7. The Application is supported on the grounds set out in the body of the motion as well as on the affidavit sworn by LILLY ENID KAARI MUGO administratix of the 2nd defendant on 11/07/2023.

8. The application is opposed by the Replying Affidavit sworn by Joseph Isaac Otieno dated 28/07/2023. He was substituted through a decision on 25/10/2018 by my sister Justice Komingoi to replace the plaintiff. He is also the administrator of the plaintiff.

9. In opposing the application, he avers that there is a judgment in place which is lawful. That the 2nd defendant was served with summons but he chose not to enter appearance. That the 2nd defendant commenced construction on the suit property after removing the plaintiff's temporary fence and when he was confronted by the plaintiff he threatened her forcing the plaintiff to seek legal redress.

10. He avers that at the time he was served, the 2nd defendant was on the suit property supervising construction which had commenced. He states that the process server who served the 2nd defendant is no longer working as a process server since he closed his offices which he was operating from in 2004. That it is 19 years since the service was done and therefore the is unable to trace the process server.

11. He argues that the defence by the defendant is not arguable and has no triable issues. He has stated that the 1st defendant denied that the 2nd defendant owns the suit property and he attached annexture "D" which is the Up-To-Date list of Allottees which was produced during the hearing of the main suit by the 1st defendant through its advocates M/s EN Omoth & Co. Advocates. The list shows the plaintiff as the owner of Plot No. 189 and Block No. 522. This information is not controverted by the applicant herein.

12. The defendant has averred that whereas payment of rates is itself not proof of ownership of the property but the plaintiff has paid rates to the 1st defendant in respect of the suit property over the years since she was allotted the suit land. He attached annexture "E" as testament to this proposition.

13. The parties filed their respective submissions which I have considered together with their dispositions.

**Brief Background of the case**

14. I think it is necessary that I give a background of the suit more specifically on the process leading to the delivery of the judgment thereto which is the subject of this application before delving into examining the issues raised in the application and opposed by the Plaintiff/Respondent in his Replying Affidavit.

15. The Plaintiff/ Respondent herein filed this suit on 4/10/2004 vide a plaint praying for a permanent mandatory injunction to be directed at the Registrar of Titles to deregister the 2nd defendant as the property and to register the plaintiff/respondent as the proprietor, permanent mandatory injunction against the 2nd defendant restraining him from interfering with the suit property and damages against the 1st defendant for unlawfully leasing the plaintiff's property to the 2nd defendant.

16. The 1st defendant upon being served, filed a defence dated 22/12/2005. The now deceased 2nd defendant never appeared and did not file any defence. The 3rd defendant who was Attorney General on behalf of the Chief Land Registrar did not file a statement of defence and was excused from participating in the proceedings with the consent of the plaintiff.

17. On 28/10/2018 leave was granted for the plaintiff to be substituted by her son for purposes of adducing evidence in the suit and so the plaintiff's son Joseph Issac Weda Otieno testified as PW1. The gist of his testimony was that he did not know how the 2nd defendant had been registered as the owner of the suit property.

18. The 1st defendant chose not to call for viva voce evidence and instead relied on the evidence on record including the documents filed by the 1st defendant. From the 1st defendant's list of documents there is a Memo dated 10th February 1998 from the Director of City Planning Architecture to Chief Council

which had enclosed an up-to- date list of allottees of Jamhuri Phase II scheme and against Plot No. 189 Block 522 is the name of Mrs M.E Omondi the now deceased plaintiff herein.

19. As a result of the said list and the allotment letter to the plaintiff, on 12/01/1998, the 1st defendant executed a lease agreement in her favour. The court after hearing the matter issued a judgment in the favour of the plaintiff.

20. The judgment was delivered following the hearing of the matter on merit. The judgment was delivered on 17/05/2019 and in this current Application, the 2nd intended Defendant/Applicant seeks to be set aside on grounds that the Defendant was not given an opportunity to defend the suit since he was not served.

**Analysis and Determination**

21. From the introduction and the background above I deduce the following as the issues for determination;

    a. whether there was an improper service of the hearing notice on which basis the Applicant can be entitled to stay of execution of the judgment dated 17/05/2019.

    b. whether the Statement of Defence filed by the applicant raise triable issues to warrant the stay of the judgment.

**Whether there was an improper service of the hearing notice on which basis the Applicant can be entitled to stay of execution of the judgment dated 17/05/2019.**

22. The first issue that the court must deal with is whether there was proper service of the hearing notice upon the 2nd defendant. The Applicant in paragraphs 4 and 5 of her Supporting Affidavit denies that the 2nd defendant was not served. She states that her husband now deceased 2nd defendant was a public servant who could not have been on site supervising construction. At paragraph 7 she avers that the 2nd defendant was a public figure who anyone would have walked to his office and served him.

23. The applicant has not placed before this court any evidence to convince the court that if one is a public servant they cannot supervise construction of what is alleged to have been a property allocated to them which they developed. Nothing stops a public servant from doing so. Further she alleges that the 2nd defendant was a public figure who could have been served in his office. Again she has not produced any evidence to show that being a public figure he was more accessible in the office than he would be at a construction site.

24. At paragraph 3 the applicant avers that when she sought to have a conversion of the suit property on Ardhi Sasa on 5/07/2023 is when she discovered that the court issued a judgment in this matter on 17/05/2019.

25. From the forgoing, is it true that the 2nd defendant now deceased was a total stranger to the proceedings of this suit? Certainly not. From the background of the case hereinabove and the Affidavit of Service produced by the Applicant, it shows that service was properly executed upon the 2nd defendant. The court issued an interlocutory judgment against the 2nd defendant on 2/06/2005 but still went ahead to hear the matter on merit after the 2nd defendant failed to enter appearance nor file a defence. If it is true as alleged by the applicant that 2nd defendant paid rates, then he would have discovered from the 1st defendant that the suit property was not available for him after the court issued the judgment.

Better still he would have known from his visit to the office of the 1st defendant that there was an active court case to which the 1st defendant was a party.

26. I therefore find that the Applicant is being dishonest by claiming her husband, the 2nd defendant (now deceased) was not served and therefore not given a chance to be heard. stranger to the suit. The 2nd defendant however took the option of keeping away from the hearing of the case. They cannot, after service of the hearing notice, feign to have been ignorant of the fact that there was a case against them. They cannot therefore be heard to say that the first time they heard about the case was after judgment had been delivered.

27. My finding is that the 2nd defendant was duly and properly served with summons and also properly served with the hearing notice. The judgment entered into was therefore regular. It is not the sort of judgment that can be set aside ex debito justitiae. It can only be set aside following the discretion of this court.

28. The Court in the case of Shah vs Mbogo (1967) EA 166, held that: -

> " .....this 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 is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice...." (emphasis mine)

29. From the above case, can it be said that the Applicant has demonstrated that the failure of the 2nd defendant to attend the Court during hearing was an excusable mistake? Absolutely no. In my analysis herein above the Applicant's husband never cared about the proceedings of the case. It is not demonstrated in the Application, the efforts the 2nd applicant made in following up on the proceedings of the case. All that is alleged by the Applicant who was not a party to the suit is that, the husband was a strict and organized man who would not have let the matter go unattended or the case go undefended.

30. The Applicant argues that she only got to learn about the case after her husband's death, almost 18 years after he was served with the summons and hearing notice. This clearly paints the 2nd defendant as an indolent party whom the doctrines of equity cannot aid. I also wonder how the Applicant got hold of the hearing notice which she attached to her Application and which notice she claims was never brought to the attention of her husband. Further, now that the Applicant was not party to this instant suit, I find her account that her husband was not informed about the hearing date nor the proceedings as hearsay evidence.

31. For instance, the allegations that her husband was not at the construction site can only be held to be hearsay now that her husband is dead and cannot be called upon to substantiate the same.

32. I agree with counsel for the Plaintiff/respondent that this court should not come to the aid of a party who comes to Court seeking to set aside a judgment that was delivered 3 years after the same had been passed on a suit that was filed in court 15 years against him, on grounds that he was not served with the summons or hearing notice and that the applicant only learnt about the judgment on 5/07/2023. If I allowed this Application on such reasons, I will be going against the Doctrine of Equity that states that; Equity aids the vigilant and not the indolent.

33. In the case William Macharia Maina & Another V Francis Barchuro & 3 Others, Kibiwott Yator Kuryases & 8 Others (Interested Parties)eKLR Odeny J clearly stated, that;

> " .....It should be noted that the duty of the court is to do justice and justice for all the parties involved. The parties must also not be indolent in the way they prosecute their cases. A party

can be enjoying some interim orders of status quo which might necessitate the reluctance in prosecuting a case. On the issue of service I find that there was proper service and the defendants just woke up when the judgment and decree were up for execution……." .

34. From the forgoing therefore, I find that the Applicant's husband was properly served with the hearing notice in person. Further, the Learned Judge having ascertained that he was properly served, proceeded to hear the case and delivered its Judgment in open court on 17/05/2019. I see no sense of staying nor setting aside his Judgment on ground that the applicant was not aware of the hearing date.

**Whether the statement of defence filed raises triable issues to warrant the stay, setting aside and re-open the case.**

35. In an Application for setting aside judgment, the Applicant must establish that he or she has a defense with triable issues. Setting aside judgment is not automatic.

36. The Civil Procedure Rules give two incidents where a Judgment in Default of Appearance may be tampered with:

    a. Irregular Judgment - Where service of Summons to Enter Appearance was inadequate; and

    b. Regular Judgment – Where service of Summons was effected, but there is an arguable Defence, and compelling reasons proffered as to why the same was not filed in time.

37. In James Kanyiita Nderitu & Another -vs- Marios Philotas Ghikas & Another [2016]eKLR, the Court of Appeal stated that;

> " From the outset, it cannot be gain-said that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others...."

38. In Ecobank Kenya Limited vs Minolta Limited & 2 Others [2018] eKLR, Justice Sewe notes at paragraph 19 of the Court's Judgment by echoing the sentiments of Kiage J (as he then was);

> "I am not in the least persuaded that Article 159 of *the Constitution* and the Oxygen Principles.... were ever meant to aid in the overthrow of destruction of rules of procedure and to create an anarchical free for all in the administration of justice..."

39. From the default Judgment, the learned Judge had an opportunity to have a careful consideration of the issues at hand and even noted that the allotment of the suit property to the plaintiff was done on 13/02/1992 and the plaintiff accepted the terms vide a letter dated 29/02/1992 and she executed a lease agreement prepared by the 1st defendant on 12/01/1998. Although she was never issued with a title deed.

40. The court observed that since the plaintiff was allotted the suit property, the suit property would not have been available to be allotted to the 2nd defendant in 1999 since there was not property to be allotted.

41. I therefore find that the defence filed by the applicant does not raise any other triable issue that will warrant this court to set aside the default Judgment and its execution.

42. In the light of the aforesaid, I dismiss the Notice of Motion Application dated 11/07/2023 with costs to the Plaintiff/Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2023.**

**.....**

**MOGENI J**

**JUDGE**