



**Mahdi (aka Swafiya Abdalla) & another v Charo & another (Environment & Land Case 53 of 2012) [2023] KEELC 22428 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22428 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 53 OF 2012  
EK MAKORI, J  
DECEMBER 7, 2023**

**BETWEEN**

**SWAFIA SWALEH MAHDI (AKA SWAFIYA ABDALLA) ..... 1<sup>ST</sup> PLAINTIFF**

**FATMA SWALEH MAHDI [AS ADMINISTRATRICES OF THE ESTATE OF  
SWALEH MAHDI] (DECEASED) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**CHARLES CHARO ..... 1<sup>ST</sup> DEFENDANT**

**JANE (AKA ROSE K PONDA) ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. 2<sup>nd</sup> defendant's application dated 30<sup>th</sup> March 2023 sought the following relief(s):
  - a. Spent.
  - b. Spent
  - c. Stay of execution of the judgment in this matter pending the hearing and determination of this matter.
2. The applicant (2<sup>nd</sup> defendant averred that when this matter was heard, no service was effected upon her or at all. She bought the land in contention herein from the 1<sup>st</sup> defendant. She has done extensive development on it. PEFA church was built next but was also not served. Besides, she has been on the land in contention since 2012 uninterrupted.
3. The applicant will seek to be heard on merit in this matter and the ex-parte judgment be set aside in totality and a hearing on merit begins afresh. The applicant also contended that she was never served with the notice of delivery of judgment.



4. The respondent on the other hand averred that the 2<sup>nd</sup> defendant was properly served with the suit papers by a Process Server called Mr. Morriss Mwavuo in the presence of the plaintiff respondent. It was on 29<sup>th</sup> November 2012.
5. That on 3<sup>rd</sup> December 2012, when the matter proceeded before this Court - Angote J. the proceedings indicate that Ms. Mwanja sought more time to file some replies on behalf of all the defendants, meaning she represented all the defendants named in this suit.
6. There is an ancillary application dated 31<sup>st</sup> May 2023 seeking to have the Process Server who now works with the firm of Ms. Mwarandu representing the 2<sup>nd</sup> defendant be called for cross-examination on the manner he served the 2<sup>nd</sup> defendant.
7. Parties were directed to file written submissions.
8. The applicant submitted on non-service but proceeded to state that even if service was effected on Counsel for the applicant, the mistake of Counsel cannot be visited upon the client, citing the case in Milimani Commercial and Tax Division Case No. E457 OF 2020.
9. The respondent on the other hand stated that there was proper service to the applicant. The Process Server has sworn to that effect. The Court record also shows that Counsel was appearing for her in the proceedings as recorded on 3<sup>rd</sup> December 2012, when the matter proceeded before this Court - Angote J.
10. In case the Court is not satisfied with the material before it on service, the respondent will seek the process server to be called to clarify the position and be cross-examined.
11. On the merit of the intended defence, the respondent averred, there is no consent from the Land Control Board on the sale, and therefore the sale stands null and void
12. What falls for the decision of this Court is whether to stay execution herein, set aside judgment, and order for the matter to be heard afresh. Moreover, whether to call the process server for cross-examination in the alternative and who should bear the costs of the current application.
13. The conditions for setting aside ex-parte judgments are as stated in the case of *Mureithi Charles & another v Jacob Atina Nyagesuka* [2022] eKLR, where Odunga J. stated as follows:

“In considering whether or not to set aside a judgment, a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent it is to have the power to invoke the expression of its coercive power when that has been obtained only by a failure to follow any of the rules of procedure. It is then not a case of the judge arrogating to himself a superior position over a fellow judge but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte. Moreover, the judge is not interfering



with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence, or excusable mistake or error. The substance of his judgement would be that in view of the defence, there is a prima facie defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless, he may hold that it would be just to set aside the ex parte judgement. See *Bouchard International (Services) Ltd v. M'mwereria* [1987] KLR 193; *Evans v. Bartlam* [1937] 2 All ER 647.”

14. In this matter, service is disputed. The return of service done by one Mr. Morriss Mwavuo shows the contrary - personal service was done to the applicant in the presence of the plaintiff-respondent. It was on 29<sup>th</sup> November 2012. On the other hand, the Court record also shows that Counsel was appearing for the applicant in the proceedings as recorded on 3<sup>rd</sup> December 2012, when the matter proceeded before this Court - Angote J.
15. I am satisfied that the judgment herein stands regular there was proper service. There will be no need to call the process server for cross-examination in the ancillary application.
16. On the merits as to whether there is a defence raising triable issues, a point has been taken that even the sale agreement was not subjected to the Land Control Board and the sale stands void. There is also the inordinate delay; judgment in this matter was rendered in the year 2015. Laches and delays catch up with the applicant.
17. This is not one of those cases to revive. The application dated 30<sup>th</sup> March 2023 is hereby dismissed with costs. The ancillary application dated 31<sup>st</sup> of May 2023 is marked as spent.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 7<sup>TH</sup> DAY OF DECEMBER 2023.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Mr. Kimani for the Respondent

Mr. Shujaa for the applicant

