



**Sule v Otieno & 3 others (Environment & Land Case 38 of 2017)  
[2023] KEELC 22139 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22139 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 38 OF 2017  
E ASATI, J  
DECEMBER 7, 2023  
IN THE MATTER OF LAND PARCEL NO.  
KISUMU/WATHOREGO/916 AND RESULTANT SUBDIVISION  
INTO LR NO. KISUMU/WATHOREGO/5155,5156 AND 5157  
AND  
IN THE MATTER OF SECTION 38 OF THE LIMITATION OF  
ACTIONS ACT CAP 22 LAWS OF KENYA  
AND  
IN TH EMATTER OF ORDER 37 RULE 7(1) CIVIL PROCEDURE  
RULES**

**BETWEEN**

**PEREZ ATIENO SULE ..... PLAINTIFF**

**AND**

**SELINA AOKO OTIENO ..... 1<sup>ST</sup> DEFENDANT**

**KEVIN KEEGAN OTIENO ..... 2<sup>ND</sup> DEFENDANT**

**MARY AKOTH OTIENO ..... 3<sup>RD</sup> DEFENDANT**

**RAYMOND ODUOR MUHULA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of the Notice of Motion application dated 27<sup>th</sup> April 2023 brought by the 4<sup>th</sup> Defendant pursuant to the provisions of Order 12 Rule 7 of the [Civil Procedure Rules](#), Sections



- 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act* Cap 21 Laws of Kenya. The application seeks for orders that: -
- a. The judgement entered on the 17<sup>th</sup> January 2023 together with all consequential proceedings thereto be set aside unconditionally.
  - b. The plaintiff be directed to effect proper service of her Originating Summons upon the 4<sup>th</sup> Defendant to enable the 4<sup>th</sup> Defendant file his response and defend the claim on merit.
  - c. In the alternative to (b) above, the 4<sup>th</sup> Defendant be granted leave to file response to the Originating Summons and defend this suit in the usual process.
  - d. Costs of this application be provided for.
2. The grounds upon which the application was brought are firstly, that the applicant was never served with the Plaintiff's Originating Summons and was never aware of the existence of the case. Secondly, that the applicant has a legitimate right to defend himself in these proceedings and have a determination of the dispute on merit under articles 21 (1), 25 (c), 47(1), 48 and 159 (2) (d) of *the Constitution* of Kenya. Thirdly, that the applicant has a good defence to the Respondent's case and it is in the interest of justice to grant the relief sought ex debito justitiae. And that no prejudice shall be caused to the Respondent if the order sought is allowed.
3. The application was supported by the averments contained in the Supporting Affidavit sworn by the Applicant Raymond Oduor Muhula on the 6<sup>th</sup> of March 2023 and the annexures thereto.
4. The Plaintiff/Respondent opposed the application vide the contents of her Replying Affidavit sworn on 9<sup>th</sup> September 2023 and the annexures thereto.
5. The Plaintiff's case is that the 4<sup>th</sup> Defendant was served with the amended Originating Summons through his agent one Owino Genga who confirmed that he had instructions from the 4<sup>th</sup> Defendant to receive the documents and forward them to the 4<sup>th</sup> Defendant. That the service was in accordance with the provisions of Order 5 Rule 8 of the Civil Procedure Rules. That the Applicant has not sought to cross-examine the process server so as to confirm the service or lack of it. That the applicant has not annexed a draft response to demonstrate that he has a defence that raises triable issues. That allowing the application will amount to a waste of judicial time. That the application is without merit.
6. The application was canvassed by way of written submissions. It was submitted on behalf of the applicant that the applicant was not served with the Originating Summons. Counsel for the applicant relied on the case of *Shah vs Mbogo* (1967) EA 166 where it was held that
- “the discretion to set aside an ex parte judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error...”
7. Counsel also relied on the provisions of order 12 rule 7, Order 5 Rules 1(1), (6), 13 and 15 of the *Civil procedure Rules* and section 20 of the *Civil Procedure Act*. Counsel submitted that the process server who swore the Affidavit of Service that he served the Originating Summons upon one Owino Genga on behalf of the applicant did not indicate in the Affidavit what reasons made him believe that Owino Genga was related to the Applicant in any way. That the court ought to call the process server to be cross-examined for the interests of justice. That at the time of service the Applicant was out of the Country in the United States of America.
8. It was submitted on behalf of the Plaintiff/Respondent that the requirements on service of court process are provided for in Order 5 of the Civil Procedure Rules. That the law provides for service



upon an agent and that in the present case the agent was served. Relying on the case of *Shadrack Arap Baiywo vs Bodi Bach (1987)*<sup>eKLR</sup> where it was held that if the fact of service is denied it is desirable that the process server is put into the witness box and opportunity of cross-examination given to those who deny the service, Counsel submitted that the applicant has not requested to have the process server appear for cross-examination and does not expect the court to litigate on his behalf. That it was proper to serve the agent who confirmed that he had authority to receive service on behalf of the Applicant.

9. Counsel further submitted that whatever the defence the applicant has ought to have been annexed as a draft in order to invoke the court's discretionary powers to set aside the judgement. That otherwise it will amount to punishing the Plaintiff who has diligently prosecuted her case to conclusion.
10. Order 12 of the *Civil Procedure Rules* 2010 pursuant to which the application is brought makes provision for hearing of cases and consequences of non-attendance. Rule 7 thereof provides that

“where under this order judgement has been entered or the suit has been dismissed, the court on application may set aside or vary the judgement or order upon such terms as may be just.”

The grounds that courts consider in determining an application to set aside judgement include explanation for non-attendance, whether or not the applicant has a defence that raises triable issues and whether prejudice will be occasioned to the Respondent.

11. In the present case, the explanation for non-attendance and non-participation of the applicant in the proceedings that led to the judgement was that the applicant was never served with the Originating Summons or notified of the existence of the suit until after the judgement.
12. Regarding service, the record shows that the initial Defendants in the suit were 3 namely; the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein. That the 4<sup>th</sup> Defendant applicant herein was introduced into the case vide amendment to the Originating Summons effected on 2<sup>nd</sup> September 2019. The record further shows that the Affidavit of Service for service of the amended Originating Summons upon the 4<sup>th</sup> Defendant was sworn on 29 October 2020 by one Stephen Otieno Onyango, a Court Process Server. He deposed in the Affidavit that on 24<sup>th</sup> September 2020 accompanied by the Plaintiff they went to the suit parcel at Mamboleo area where he had previously effected service and to a construction site pointed out by the Plaintiff. That at the site, the Plaintiff pointed out a person who introduced himself as Owino Genga, the caretaker and relative of the 4<sup>th</sup> defendant. That after consulting someone on phone, the said Owino Genga accepted service but declined to sign the return copies.
13. The Plaintiff argues that this was proper service and in accordance with the provisions of Order 5 Rule 8 *Civil Procedure Rules*. Order 5 Rule 8 of the *Civil Procedure Rules* provides that where it is practicable, service shall be made on the Defendant in person unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient. The process server deposed that the person he served with the documents was pointed out by the plaintiff and that the person introduced himself to the process server as caretaker and relative of the 4<sup>th</sup> Defendant. Order 5 Rule 11 provides

“where in a suit to obtain relief respecting or compensation for wrong to immovable property, service cannot be made to the Defendant in person it may be made on an agent of the Defendant empowered to accept service or an agent of the Defendant in charge of the property.”

14. From the description in the Affidavit of Service of the person who was served with the amended Originating Summons on behalf of the 4<sup>th</sup> Defendant, the person was an agent of the 4<sup>th</sup> Defendant. The person introduced himself to the process server as the care taker and relative of the 4<sup>th</sup> Defendant



and before he accepted to take the documents, he made a phone call to someone over the same and received instructions to receive the documents for onward transmission to the 4<sup>th</sup> Defendant.

15. Though the applicant claims to have been out of the country no evidence was exhibited to the court to demonstrate this. The applicant chose not to call the process server to cross examine him and test the credibility of the averments in the Affidavit of Service.
16. Taking into account the contents of the Affidavit of Service, the Supporting Affidavit to the application and the Replying Affidavit I find that the 4<sup>th</sup> Defendant was properly served with the amended Originating Summons and accompanying documents through his agent one Owino Genga. That hence there is no sufficient explanation tendered for failure to file defence and for non-attendance.
17. The other matter to consider in an application of this nature is whether the applicant has a defence to the plaintiff's claim that raises triable issues. No draft defence or Replying Affidavit to the amended Originating Summons has been annexed to the application to demonstrate this. Setting aside the judgement may therefore be an exercise in futility.
18. It is true that the right to be heard is protected by *the constitution* but in this case the 4<sup>th</sup> Defendant failed to seize the opportunity to be heard after he was duly served.
19. I find that the grounds for setting aside judgement have not been demonstrated. The application is hereby dismissed. Costs to the Respondent.

Orders accordingly.

**RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 7<sup>TH</sup> DAY OF DECEMBER 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Opondo for the Plaintiff/Respondent.

Ojuro for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

Akinyi for the 4<sup>th</sup> Defendant/Applicant.

