



**Mbisi v Sirona & 5 others (Environment & Land Case 27 of 2019)
[2023] KEELC 22076 (KLR) (5 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22076 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 27 OF 2019**

M SILA, J

DECEMBER 5, 2023

BETWEEN

DAVID NYAGERO MBISI PLAINTIFF

AND

ZACHARY KIRERA SIRONGA 1ST DEFENDANT

SILVESTER OKARI MAIKO 2ND DEFENDANT

FLORENCE KEMUNTO MOTARI 3RD DEFENDANT

THE COUNTY LAND REGISTRAR, KISII COUNTY 4TH DEFENDANT

THE COUNTY SURVEYOR 5TH DEFENDANT

HON. ATTORNEY GENERAL 6TH DEFENDANT

RULING

1. The application before me is that dated 4 April 2023 and filed on 3 May 2023 by the 3rd defendant. What the applicant seeks is an order to set aside the proceedings of 16 May 2022, and the subsequent judgment delivered on 25 August 2022, and that he be granted leave to file defence out of time. The application is principally anchored on the ground that the applicant was never served with summons, or with any document relating to the case, and the applicant contends that the affidavits of service filed are false. She avers that she only came to learn of the judgment when the Land Registrar summoned her and demanded to have her title for purposes of cancellation. She craves that she be heard as she has a good defence to the suit of which she has annexed a draft defence.
2. The application is opposed by the plaintiff who has sworn a replying affidavit. He has deposed that on 30 November 2019, he accompanied a process server by name of Isaac Nyangena Kemari to the home of the applicant, where she was served with summons to enter appearance. He avers that they did not find the applicant but found her brother who informed them that she was away in Saudi Arabia. He



states that on 30 September 2020, the process server once again went to the home of the applicant and found a brother of the applicant, one Vincent Ongeri, who told the process server that the applicant was still in Saudi Arabia. He does not think that the applicant has any good defence to warrant the setting aside of the judgment. He contends that the 1st defendant illegally acquired the land in dispute, which is West Kitutu/Bogusero/1286, proceeded to subdivide it and transfer the resultant subdivisions to the applicant, and therefore her title cannot be protected. He also adds that the judgment was delivered more than 8 months to the filing of the application.

3. I invited counsel to file written submissions to canvass the application and I have seen the written submissions of Mr. Begi, learned counsel for the applicant, and Mr. Momanyi, learned counsel for the plaintiff. I have taken these into account before arriving at my decision. The other defendants did not oppose the motion.
4. I have gone through the record. I have seen that this suit was commenced through a plaint filed on 13 September 2019. The plaintiff filed suit as administrator ad litem of the estate of the late Mbisi Matunda who was said to have died intestate on 19 August 2014. It was pleaded that the deceased owned the land parcel West Kitutu/Bogusero/1286 at the time of his death. It was averred that while the plaintiff was gathering the estate of the deceased in the year 2017, he discovered that the 1st defendant had through fraud, inter alia using a grant in Kisii Succession Cause No. 200 of 2011 which relates to a different person, managed to have himself registered as proprietor of the suit land on 28 July 2011 when the deceased was still alive. He subsequently caused the land to be subdivided into the parcels West Kitutu/Bogusero/6448, 6449, 10064, 10065, 10098, 10185, 10186, 10187, 10188, and 10189, and transferred some of the subdivisions to the 2nd and 3rd defendants. In the suit, the plaintiff sought orders cancelling the registration of the 1st defendant as proprietor of the land parcel West Kitutu/Bogusero/1286 and revocation of all subdivisions, and have the land revert back to the proprietorship of Mbisi Matunda (deceased). He also sought orders of eviction against all persons occupying the original land parcel West Kitutu/Bogusero/1286 and a permanent injunction against them.
5. The 1st and 2nd defendants appointed M/s Bigogo Onderi & Company Advocates who entered appearance on their behalf but no defence was filed. I have seen no appearance entered for the other defendants though you would ordinarily have the State Law Office representing the 4th, 5th and 6th defendants, who are the Land Registrar, Kisii, the County Surveyor, Kisii and the Attorney General respectively. For the applicant, who was 3rd defendant, no appearance was entered. On 1 December 2021, the court (Onyango J) directed the case to be heard on 16 May 2022. The suit was duly heard in absence of all the defendants and the hearing culminated in the judgment delivered on 25 August 2022. The judgment was in favour of the plaintiff as prayed in the plaint. Matters lay quiet until this application was filed on 3 May 2023 by which time Onyango J was no longer in the station and that is how the matter is before me. I have already pointed out that the applicant seeks to set aside the proceedings and judgment of the court on the basis that she was never served.
6. What I need to interrogate is whether the record demonstrates that the applicant was served. I have seen on record a couple of affidavits of service. The first is sworn on 5 October 2020 by Isaac Nyangena Kemari. In respect of the applicant, the process server deposed that he proceeded to the home of the applicant and met one Vincent Ongiri, who informed him that the applicant was his sister, but was not available, since she was in Saudi Arabia. The said Vincent Ongiri did not accept to receive the summons and he thus returned the same unserved. The second affidavit of service is that sworn on 12 May 2022 by the same process server. He deposes that he received a court order issued on 6 May 2021 (an order of injunction) and a hearing notice (for the hearing scheduled for 16 May 2022) from counsel for the plaintiff for service with instructions to serve Mr. Bigogo who appeared for the 1st and 2nd defendants,



and the 4th, 5th and 6th defendants. There is no mention in that affidavit of instructions to serve the 3rd defendant and no indication of service upon the 3rd defendant. Those are the only two affidavits of service on record and none suggests that the 3rd defendant was ever served.

7. When a party has not been served, he is entitled to have an ex parte judgment set aside *ex debito justitiae*, that is, as a matter of right. This is because every litigant has a right not to be condemned unheard. Failure to serve a litigant means that the litigant is not aware of the suit and will not be in a position to defend himself which is contrary to the rules of natural justice. In our case, the applicant was not served. In his submissions, Mr. Momanyi, learned counsel for the plaintiff, submitted that the applicant was aware of the matter because the process server talked at length with her brother. We cannot impute that the applicant knew of the suit merely because the process server spoke to her brother. I have zero evidence that the applicant's brother informed her of the case. In fact, the process server was very elaborate in his affidavit that the applicant's brother informed him that he cannot receive summons on behalf of the applicant. It cannot, by any stretch of imagination, be declared that the applicant was served. That being the case, she is entitled to have the judgment set aside as a matter of right and that is exactly what I am going to do.
8. I hereby set aside the ex parte proceedings of 16 May 2022 and the subsequent judgment delivered on 25 August 2022. The applicant is at liberty to file defence to the suit within 14 days of today. The plaintiff ought not to have proceeded without first confirming that the applicant was served and for that reason the applicant will have the costs of this application as against the plaintiff.
9. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 5TH DAY OF DECEMBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

In the presence of: -

Mr. Momanyi for the plaintiff/respondent

N/A on part of Mr. Begi for 3rd defendant/applicant

N/A on part of Mr. Bigogo for 1st and 2nd defendants

N/A for 4th – 6th defendants

Court Assistant – Lawrence Chomba

