



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC NO. 61 OF 2017**

**LEAH WANGARI GICHURU.....PLAINTIFF**

**-VERSUS-**

**FRANCIS KANGARUA.....1<sup>ST</sup> DEFENDANT**

**SAMUEL NJUGUNA NJOROGE.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a notice of motion dated 7<sup>th</sup> June, 2021 brought under **Order 10 Rule 11 of the Civil Procedure Rules, 2010 (the Rules) and all enabling provisions of the law**, the 1<sup>st</sup> Defendant applied for setting aside of the *ex parte* judgment dated 7<sup>th</sup> December, 2017 together with all consequential orders. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavits sworn by the 1<sup>st</sup> Defendant on 7<sup>th</sup> June, 2021 and Julius Kamau Muthanwa on 12<sup>th</sup> May, 2021.
2. The gist of the 1<sup>st</sup> Defendant's application was that he was never served with summons to enter appearance in the suit hence he was unaware of the proceedings until April 2021. He further contended that the firm of Muthanwa & Co Advocates which purported to receive summons on his behalf had no instructions to do so. It was his case that he had a good defence on the merits and that the *ex parte* judgment should be set aside to enable him defend the suit.
3. The Plaintiff filed a replying affidavit sworn on 7<sup>th</sup> September, 2021 in opposition to the application. She stated that she was totally unaware of the alleged sale agreement between the 1<sup>st</sup> Defendant and her late husband for the sale of a portion of the suit property. She stated that at all material times she was the sole registered proprietor of the suit property and that her late husband had no proprietary interest in it and had no authority to sell it.
4. The Plaintiff contended that the 1<sup>st</sup> Defendant was duly served with summons to enter appearance through the firm of Muthanwa & Co advocates on his own instructions as per the affidavit of service. She pointed out that prior to the filing of the suit the said firm had sent her a demand letter in relation to the purported sale of a portion of the suit property.
5. The Plaintiff contended that the suit was filed after the Defendants entered the suit property on 21<sup>st</sup> August, 2010 and that they vacated immediately upon service of summons. It was pointed out that the summons were duly received and signed for by the firm of Muthanwa & Co Advocates on 13<sup>th</sup> December, 2010. The Plaintiff contended that since her late husband was not the proprietor of the suit property, the Defendants had no reasonable defence to the action hence no useful purpose would be served by setting aside the *ex parte* judgement.
6. When the application was listed for *inter partes* hearing, it was directed that the same shall be canvassed through written submissions. The parties were granted timelines within which to file and exchange their submissions. The record shows that the 1<sup>st</sup> Defendant filed his submissions on 12<sup>th</sup> October, 2021 whereas the Plaintiff filed hers on 3<sup>rd</sup> November, 2021.
7. The court has considered the 1<sup>st</sup> Defendant's application, the Plaintiff's replying affidavit in response thereto as well as the submissions on record. The main issue for determination is whether the 1<sup>st</sup> Defendant has made out a case for setting aside the *ex parte* judgment dated and delivered on 7<sup>th</sup> December, 2017.
8. The 1<sup>st</sup> Defendant contended that he was not served with summons to enter appearance in the suit and as such he was condemned unheard contrary to the rules of natural justice. He contended that as such he was entitled to setting aside as a matter of right and not as a matter of judicial discretion. He cited the case of **Gulf Fabricators v County Government of Siaya [2020] eKLR** in support of his submission. It was held in the said case that a default judgment obtained without service of summons is irregular and the same ought to be set aside as a

matter of right.

9. The Plaintiff, on the other hand, submitted that the material on record demonstrated that the 1<sup>st</sup> Defendant was duly served with summons to enter appearance through his advocates Muthanwa & Co Advocates who had issued a demand letter on his behalf and that the same was duly received and signed for by an employee of the law firm. It was submitted that there was various contradictions in the affidavits sworn by the 1<sup>st</sup> Defendant and Julius Kamau Muthanwa of Muthanwa & Co advocates.

10. The Plaintiff further submitted that the court's discretion to set aside an *ex parte* judgment was intended to avoid injustice resulting from inadvertence or excusable mistakes or errors but not to assist a person who was deliberately seeking to delay or obstruct the course of justice.

11. The court is aware that under **Order 10 Rule 11 of the Rules** it has a wide discretion to set aside an *ex parte* judgement on such terms as may be just. Such discretion must, however, be exercised judicially and upon reason. It should not be exercised capriciously or upon sympathy. The Applicant must consequently lay a basis for the exercise of such discretion in his favour.

12. The court is in agreement with the guiding principles enunciated in the **Gulf Fabricators case (supra)** which was cited by the 1<sup>st</sup> Defendant and the case of **Shah v Mbogo & Another [1967] EA 116** which was referred to by the Plaintiff. Where an *ex parte* judgment has been entered without service or proper service of summons, then such judgment is irregular and the same is for setting aside *ex debito justitiae* regardless of the merits of the Defendant's defence. However, where service has been regularly effected, then the court ought to consider the reason for the default in defending the suit and the merits of the proposed defence. A Defendant should at least have a reasonable defence to the action. It does not have to be a good defence or one which ought to succeed at the trial but one which merely raises triable issues worthy of consideration at a full hearing.

13. The material on record indicates that the process server filed an affidavit of service in this matter indicating that he went to the 1<sup>st</sup> Defendant's place of business near Staff Lodge on 13<sup>th</sup> December, 2010 with a view to serving him with court process. Upon arrival he did not find him but he was supplied with a cell phone number by his employee on which he communicated with the 1<sup>st</sup> Defendant. He stated that the latter asked him to serve the summons upon his advocates Ms. Muthanwa & Co Advocates in Nakuru Town. He further deposed that upon visiting the offices of the law firm he served the court process upon a secretary of the law firm called Eunice Wachira who acknowledged receipt by signing and stamping on the duplicate copy of the summons. The stamped summons was annexed to the affidavit of service.

14. The court has noted from the application that the 1<sup>st</sup> Defendant did not deny that he had a place of business near Staff Lodge in Nakuru at the material time. He did not deny that he had a staff member stationed there. Most importantly, he did not seek to call the process server who swore the affidavit of service for cross examination on the contents of the affidavit.

15. The 1<sup>st</sup> Defendant whilst denying service, simply stated that he was unaware of the suit until mid April 2021 when he was summoned by the law firm of Muthanwa & Co Advocates and handed the pleadings in the suit, that is, about eleven (11) years after the summons were reportedly served. The court finds the 1<sup>st</sup> Defendant's allegations to directly contradict paragraph 3 of the affidavit of Mr. Muthanwa which claimed that it was the 1<sup>st</sup> Defendant who "advised" him that he (the advocate) had been served with court summons in the suit.

16. The court has also noted that Mr. Muthanwa denies that service was ever effected on his firm in paragraph 11 of the affidavit. He states that: "That I verily deny that our firm was ever served with summons.". However, in paragraph 5 of the same affidavit he states that if the summons were ever served, then they could have been served upon his secretary Eunice Wamucii who has since left the law firm. The advocate further contended that the summons ought to have been served upon him personally and not upon the secretary.

17. The court is satisfied from the material on record that the 1<sup>st</sup> Defendant was duly served with summons to enter appearance through the firm of Muthanwa & Co Advocates. There is no way the process server could have known about the 1<sup>st</sup> Defendant's relationship with the law firm without such information coming from the 1<sup>st</sup> Defendant. How come the process server did not serve any other law firm in Nakuru with the summons? And how come the summons were not rejected but accepted and signed for by the firm of Muthanwa & Co advocates? The court does not accept that once an employee leaves the employment of a law firm then all his previous actions as such employee are rendered nugatory.

18. The court considers the affidavits in support of the application for setting aside to be untruthful and a conspiracy to delay or defeat the course of justice and in a bid to bail out a litigant who had failed to co-operate with his advocates to defend the suit at the opportune moment. That explains the reason why there are various contradictions in the two affidavits in support of the application.

19. The court has also considered whether the 1<sup>st</sup> Defendant has a reasonable defence to the action. The 1<sup>st</sup> Defendant's defence is that vide sale agreements made in 1996 he bought a portion of the suit property from the late husband of the Plaintiff, Bethuel Muthee Gichuru, with the Plaintiff's knowledge. There is no doubt that the suit property is **L.R No 7644/1 (I.R 8574)**. There is no doubt that the suit property was at all material times registered solely in the name of the Plaintiff. There is also no doubt that the Plaintiff was not made party to the sale agreements of 1996 and neither has it been alleged that she had given a power of attorney to her late husband to sell a portion thereof on her behalf.

20. The court is thus not satisfied that the 1<sup>st</sup> Defendant has any reasonable defence to the suit with respect to the suit property which raises a triable issue worth investigating at the trial. The court is further of the opinion that it would not serve any useful purpose to set aside the *ex parte* judgment when the 1<sup>st</sup> Defendant has no chances of overcoming the Plaintiff's proprietary rights over the suit property. Accordingly, the court is not satisfied that the 1<sup>st</sup> Defendant has satisfied the requirements for setting aside the *ex parte* judgment dated 7<sup>th</sup> December, 2017.

21. The upshot of the foregoing is that the court finds no merit in the 1<sup>st</sup> Defendant's application dated 7<sup>th</sup> June, 2021. Accordingly, the same is hereby dismissed with costs to the Plaintiff. It is so ordered.

**RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 27<sup>TH</sup> DAY OF JANUARY, 2022**

**In the presence of:**

Ms. Muigai holding brief for Mr. Gakuhi Chege for the Plaintiff

Ms Wanjiru Muriithi holding brief for Mr. Nderitu Komu for 1<sup>st</sup> Defendant

No appearance for the 2<sup>nd</sup> Defendant

CA - Carol

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**Y. M. ANGIMA**

**ELC JUDGE**