



**Ituangu v Abdulrahim & 7 others; Gulam & another (Intended Interested Party)
(Environment & Land Case 206 of 2017) [2022] KEELC 3855 (KLR) (21 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3855 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 206 OF 2017
MAO ODENY, J
JUNE 21, 2022
IN THE MATTER OF: PARCEL OF LAND KNOWN
AS PLOT NO. MUGUMO PASTA/ MAZERAS/ 10
IN THE MATTER OF: THE LIMITATION OF ACTIONS ACT CAP. 22, LAWS OF KENYA

BETWEEN

MUTUA KISALU ITUANGU APPLICANT

AND

RASHID ABDULRAHIM 1ST RESPONDENT

GULAM KADIR ABDULRAHIM 2ND RESPONDENT

FATMA ABDULRAHIM 3RD RESPONDENT

KHADIJA ISAK KHAMIS 4TH RESPONDENT

SHAHNAZ KADMBAISK PIRMOHAMED 5TH RESPONDENT

KUMAT ABDULRAHIM PIRMOHAMED 6TH RESPONDENT

SHAHIDA ABDULRAHIM PIRMOHAMED 7TH RESPONDENT

AYESHEH ABDULRAHIM CHAKERZEHI 8TH RESPONDENT

AND

SHAUN MOHAMED GULAM INTENDED INTERESTED PARTY

LAND REGISTRAR, KILIFI INTENDED INTERESTED PARTY



RULING

1. This Ruling is in respect of a Notice of Motion dated November 22, 2021 by the 1st to 9th Defendants/ Respondents seeking the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That this Honourable Court be pleased to set aside and/or vary its judgment of 28th March, 2019, pending the hearing and determination of this Application.
 - d. That the costs of this application be provided for.

Defendant/applicants' case

2. The Applicants relied on the grounds on the face of the application and stated that judgment in this case was delivered on March 28, 2019 and they only knew of the existence of this case on October 21, 2021 further that they are yet to be supplied with the Plaintiff's pleadings.
3. The Applicants relied on the supporting affidavit of Gulam Kadir Abdulrahim, who deponed that they learnt of the existence of this suit on 30th September, 2021 vide an advertisement appearing in the Standard Newspaper and immediately instructed their advocate on record to enter appearance on their behalf and defend their interests.
4. It was the Applicants' case that the matter came up on October 19, 2021 and their advocate on record requested to be supplied with all pleadings which request was duly granted but the pleadings are yet to be supplied.
5. The Applicant further deponed that on March 5, 2005, all that parcel of land known as Mgumo/ Pasta/ Mazeras/ 1064 measuring approximately 0.33 hectares was duly registered in favour of one Abdulrahim Pirmohmed Kamalkhan and that upon his demise, his estate applied for and were issued with Letters of Administration which letters were confirmed on the July 14, 2015.
6. He further stated that they were unable to trace the original title hence applied for issuance of a duplicate title and before the expiry period of the Gazette Notice, a new title in favour of the Plaintiff was issued on 4th July, 2016. The Applicant stated that vide a statutory declaration dated 19th September, 2016, they sought for registration of the caution.
7. It was the Applicant's averment that the Plaintiff obtained judgment without disclosure of material facts, in bad faith and urged the court to allow the application to give the Applicants an opportunity to be heard on merit

Plaintiff/respondent's Case

8. The Plaintiff filed a Replying Affidavit sworn on February 18, 2022 and deponed that by an Originating Summons dated September 28, 2017 he annexed a certificate of official search which showed that the suit land was registered in the names of the 8 Applicants. He further stated that he has been in occupation of the suit property for over 12 years and that the Applicants have not provided any evidence to show that they have attempted to re-enter the suit property and evict him.



9. It was the Plaintiff's case that the Applicants are being dishonest by alleging that they learnt about the suit through the newspaper advertisement of September 30, 2021 but did not notice the summons dated March 22, 2018. The Plaintiff stated that there are contradictions as to when the Applicants became aware of the suit as on one part they stated that that they became aware of the suit on 21st October, 2021 and on the other September 30, 2021.
10. It was the Plaintiff's case that the Applicants having learnt of the suit on September 30, 2021, they delayed in filing the present application having filed it on November 24, 2021. Further, that the purported transfer of the suit property by the Applicants in favour of the 1st Interested Party was done during the pendency of this suit which is a nullity.
11. The Plaintiff therefore urged the court to dismiss the application as he will suffer prejudice if the orders sought are granted and that the Applicants have never been of the suit land.
12. Counsel agreed to canvas the application vide written submissions which were duly filed and counsel highlighted

Defendant/applicants' Submissions.

13. Counsel reiterated the averments of the Applicant and relied on Order 12 Rule 7 of the Civil Procedure Rules on setting aside or varying judgments which provide that: -

where under this Order judgment has been entered or suit dismissed, the court, on an application, may set aside or vary the judgement or order upon such terms as may be just.”
14. Mr. Achoka also cited the cases of *Mbogo vs= Shab* (1968) E.A and *Esther Wamaitha Njithia & 2 others vs= Safaricom Limited* (2014) eKLR where it was held that discretion is free and the main concern of the court is to do justice and not to assist a person who deliberately sought whatever by evasion or otherwise to obstruct justice.
15. Counsel submitted that an applicant must show sufficient cause why the orders should be granted and that the Applicant has met the threshold for grant of the orders sought. That the Applicants were never notified of the suit.
16. Mr. Achoka relied on the above cases to emphasize the discretion of the court to set aside ex-parte judgments and submitted that at the time the Applicant approached the court there was in existence a gazette notice seeking reconstruction of a duplicate title, the Plaintiff had caused himself to be registered as an owner and later an adverse possessor.
17. Counsel further submitted that time within which pleadings for adverse possession were to commence had not lapsed as it would be due on July 13, 2027 the date when the grant was confirmed.
18. Mr. Achoka submitted that the fact that the Plaintiff filed an application for joinder of other parties after judgment is an admission that this application should be allowed as prayed.

Plaintiff/respondent's Submissions

19. Ms. Randa reiterated the contents of the replying affidavit and submitted that the Plaintiff sought to join the Interested Party after judgment as he had been registered as an owner of the suit land.
20. Counsel further submitted that a letter dated September 24, 2019 and the averments made at paragraph (f) of the affidavit are not tandem with the annexure as the letter refers to a person Ishadahi Mohamed



Sumra who is not a party to this suit. Further that the firm of Kanyi J was complaining about an alleged fraud on the registration of the property and that the complaint has nothing to do with this property.

21. Ms Randa submitted that the 1st Interested Party had committed fraud and registered himself as a proprietor and that there was no evidence that the 1st Interested Party is in occupation of the property as per the Replying Affidavit dated 18th February, 2022. Counsel urged the court to dismiss the application.

Analysis and Determination.

22. This is an application for setting aside of an ex parte judgment. The issue for determination is whether the Applicants have met the threshold for setting aside or varying the judgment dated March 28, 2019.

23. Order 10 of Rule 11 of the Civil Procedure Rules provides as follows: -

where judgement has been entered under this order, the court may set aside or vary such judgement or any consequential decree or order upon such terms as are just.”

23. Courts have the discretionary power to set aside ex parte judgments with the sole aim of ensuring that justice is done to all the parties and not only the Applicant as was held in the case of *Patel -v- E.A. Handling Services Ltd* (1974) EZ 75 and *Tree Shade Motor Ltd -v- D.T. Dobie Co. Ltd* CA 38 of 1998 and *Mania -v-Muriuki* (1984) KLR 407. The courts held that the discretion of the court should be exercised to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error.

24. Further in the case *Kenya Commercial Bank Limited vs. Nyatenge & Another* (1990) KLR 443 where Bosire, J (as he then was) held that; -

Order IXA Rule 10 of the Civil Procedure Rules donates a discretionary power to the court to set aside or vary an ex parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just. The discretion is a free one and is intended to be exercised to avoid injustice or hardship but not to assist a person of deliberate conduct intended to obstruct or delay the course of justice.”

25. The Supporting affidavit of Gulam Kadir Abdulrahim, the 2nd Defendant deponed that they only became aware of the suit on the 30th September, 2021 vide advertisement appearing in the Standard Newspaper of the said date. That though they instructed their advocate to enter appearance and defend their interests in the matter, there was delay in service of the pleadings. He also stated in his affidavit that an application for issuance of a duplicate title deed was made but a new title deed in favour of the Plaintiff was issued on the July 4, 2016 yet the judgment of this court in respect of adverse possession was delivered on the March 28, 2019.

26. I also note that the affidavit sworn by the 2nd Applicant in support of the present application refers to a letter dated August 22, 2016 which was written to the 2nd Interested Party seeking for cancellation of the title issued in favour of the Plaintiff and that the purported transfer of the suit property by the Applicants in favour of the 1st Interested Party was done during the pendency of this suit.

27. This is a case where many issues are outstanding and the Applicants have stated that they were not aware of the case and when they became aware they filed the application immediately and asked for the pleadings which the court had to order the Respondent to serve.



28. The Respondent also admitted that they made an application for joinder of the Interested Party after judgment when they realized that the Interested was the registered owner of the suit land. This is a reason why the parties to the suit should be given an opportunity to ventilate their issues.
29. In the case of *Departed Aseans Property Custodian Board v Issa Bakuya* the Supreme Court of Uganda in Civil Appeal No. 18 of 1991 held that: -

An application to set aside an ex-parte Judgment cannot succeed if no good or substantial reasons are given to justify the setting it aside.”
30. The application must also be filed without inordinate delay. The Applicants have explained why they filed this application in 2021 when they became aware of the case through advertisement. It would be in the interest of justice to allow the parties that this matter be heard on merit considering the issues involved including an allegation of fraud, the doctrine of lis pendens, the issue of adverse possession and estate of the deceased.
31. I have considered the application, the submissions by counsel and the relevant authorities and find that this is a case where I will exercise my unfettered discretion in favour of the Applicants and allow the application as prayed.
32. The judgment delivered on March 28, 2019 is hereby set aside and all the consequential decrees thereof. Defendants to file their responses within 14 days from the date of this ruling. Defendants to pay thrown away costs of Kshs 40, 000/ within the next 30 days failure to which the order lapses. Costs in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF JUNE, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the [Civil Procedure Rules](#).

