



REPUBLIC OF KENYA



KENYA LAW
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**Gitee & 12 others v Mbushiri (Environment & Land Case
864 of 2017) [2022] KEELC 3197 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3197 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 864 OF 2017**

JG KEMEI, J

JUNE 9, 2022

BETWEEN

NJERI GITEE 1ST PLAINTIFF
PETER KIRIKA MWANIKI 2ND PLAINTIFF
GIBSON KAIRU GUCHU 3RD PLAINTIFF
JOHN KIBUIKA KIHUNGI 4TH PLAINTIFF
JAMES KIMEMIA GITHERI 5TH PLAINTIFF
FRANCIS GATHU KIMEMIA 6TH PLAINTIFF
EDWARD MWANGI NDUNGU 7TH PLAINTIFF
FRANCIS MUHORO MWANGI 8TH PLAINTIFF
JOAN MWIHAKI MBUGUA 9TH PLAINTIFF
CAROLINE WAMAITHA GITHINJI 10TH PLAINTIFF
LEAH KABURA KIMANI 11TH PLAINTIFF
**JOHN NJOROGI WANJIKU (ON BEHALF OF BETHEL
CHURCH) 12TH PLAINTIFF**
ESTHER KIBUI KURIA 13TH PLAINTIFF

AND

JOSEPH NDURA MBUSHIRI DEFENDANT



RULING

1. This suit was set down for formal proof hearing on 29/5/2019 whereby three Plaintiff witnesses testified. Judgment was slated for 30/7/2020 and before its delivery the Defendant/Applicant filed the instant Application dated 15th June 2020 seeking orders that;
 - a. Spent.
 - b. This Honorable Court be pleased to recall the Plaintiff's witnesses for cross examination by the Applicant/Defendant.
 - c. The Defendant/Applicant be allowed to enter appearance, file pleadings, produce and file his evidence and testify together with his witnesses.
 - d. The proceedings herein be stayed until the Applicant is allowed to cross examine witnesses and the Applicant be allowed to produce his evidence and file his pleadings before judgment is entered.
 - e. Before this Honorable Court does pronounce its judgment in this matter, it does a site visit of the suit property.
 - f. The Applicant be allowed to cross examine the Court process server Mr. Jackson K. Mutinda on issues of Service.
 - g. The draft Replying Affidavit filed herewith be deemed as properly filed and on record upon payment of the relevant fees.
 - h. Costs be in the cause.
2. The Application is premised on the grounds thereat which are replicated in the Supporting Affidavit of even date of Joseph Ndura Mbushiri, the Defendant. He averred he is the registered owner of L.R No. Ruiru/Ruiru East Block 2/1119 (the suit land) having inherited it from his late mother and obtained a copy of certificate of confirmation of grant thereof, JNM2. That his late mother had been issued with a title deed on 22/6/1992, JNM3 but when succession proceedings were ongoing, the Defendant and his siblings realized that a lady named Njeri Githee had encroached on the suit land. The Defendant then approached Nyakinyua Investment Company and his area Chief who wrote letters dated 5/6/1998 and 19/6/1998 to Nyakinyua Investment Co. asking the Company to clarify the issue of ownership of the suit land.
3. The Defendant avowed that this suit proceeded for formal proof hearing because he was never served and vehemently denied the averments in the Affidavit of Service sworn by Jackson Mutinda on 18/4/2018. That he never instructed the firm of Gathii Irungu & Co. Advocates to act for him in any other suit except in Thika CMCC No. 527 of 2014 whose pleadings are annexed as JNM7 and only learnt of the suit when he met one of the elders who was boasting about the conclusion of this suit. That having now appointed the firm of Makaka & Kiramana Advocates to act for him herein, he beseeches this Court to allow his Application in the interest of justice and constitutional right to fair hearing.
4. The Application is strenuously opposed. The 7th Plaintiff Mr. Edward Mwangi Ndun'gu on behalf of the Plaintiffs swore a Replying Affidavit dated 9/10/2020. He asserted his willingness to be examined before Court concerning service of the pleadings herein having accompanied Jackson Mutinda, the process server to the Defendant's home in Gatundu. That upon arrival in Gatundu, the Defendant



was not at home but they found his adult daughter, Lucy Gathoni and the process server called the Defendant who directed that the pleadings be served on his daughter who declined to sign though. That the Defendant also indicated that they ought to served his lawyers, Gathii Irungu & Co. Advocates who were served as well and they accepted service – see copy of received Originating Summons marked EMN1 prompting the case to proceed for formal suit.

5. The deponent admitted the existence of the trial Court suit but contended that his Advocates sought to transfer it to this Court but the trial Court declined necessitating the filing of the instant Originating Summons. He thus denied the Defendant’s allegations that he was not served.
6. Parties elected to canvass the Application by way of written submissions.
7. The firm of Makaka & Kiramana Advocates filed submissions dated 10/6/2021 on behalf of the Defendant while the Plaintiff’s submissions dated 22/6/2021 were filed by David Mutunga & Co. Advocates.
8. The Defendant/applicant drew five issues for determination; recalling of the Plaintiff’s witness for cross examination and allowing the Defendant to file his pleadings out of time; need for a site visit; cross examination of the process server, Jackson K. Mutinda; whether the draft Replying Affidavit be deemed as properly filed upon payment of fees and award of costs.
9. On the first issue, reliance was placed on Section 146(4) of the *Evidence Act* and Order 18 rule 10 *Civil Procedure Rules* that empower a Court to at any stage, recall a witness who has testified. The Defendant urged that he deserves a chance to cross examine, and produce evidence since his non-participation was not intentional but due to wrong service of pleadings. Citing Articles 50 and 159 *Constitution* of Kenya, he submitted that the Plaintiff will not suffer any prejudice if his case is re-opened.
10. Secondly, the Defendant submitted that it is imperative for this Court to conduct a site visit with a view of collecting evidence on the suit land occupation and better understanding of the dispute before Court.
11. Thirdly, he reiterated that service of the pleadings upon the firm of Gathii Irungu Advocates was erroneous as he never instructed them to act for him in this matter leading to his non-attendance in Court. He referred the Court to the case of *Republic v Chairman Borabu District Land Disputes Tribunal & 2 others Ex parte Barnabas Nyagaresi Ouro* [2014] eKLR in arguing that the Court ought to look at the defense that an applicant wishes to put forward in applications of this nature.
12. Fourthly, the Defendant urged the Court to exercise its discretion to allow the draft RA to be deemed as filed upon payment of the requisite fees. Lastly on the issue of costs, Section 27 of the *Civil Procedure Act* was cited as a Court’s discretionary award that follows the event.
13. The Plaintiff/Respondent reiterated that mode of service of pleadings is well outlined under Order 5 *Civil Procedure Rules* and in particular Rule 12 that allows service upon an adult member of the Defendant’s family when such Defendant cannot be found after a reasonable number of attempts have been made to serve him/her. That the process server severally tried to serve the Defendant in vain before the Defendant directed him to his lawyers who were acting for him in a different matter. That the service upon the firm of Gathii Irungu & Co. Advocates which was done pursuant to Order 8 rule 2 *Civil Procedure Rules* has not been contested.
14. Regarding the trial Court case, the Plaintiff stated that the case was stayed pending the outcome of the instant suit. That the Plaintiff being a Defendant in the trial Court, sought to rely on the defense of adverse possession which the Court directed be raised in this Court.



15. On whether this Court should arrest or set aside a valid default judgement, the Plaintiff set out the guiding parameters to be considered by a Court namely; attach a draft defence (in this case Replying Affidavit) that raises triable issues; demonstrate sufficient reasons for not filing the defence, the length of time that has elapsed; the likelihood to be suffered by setting aside the judgment and the best interests of the case.
16. The main issue for determination is whether the Application is merited.
17. The Defendant filed an omnibus application seeking various orders as outlined in para. 1 above. The Plaintiff instituted this suit vide an Originating Summons dated December 13, 2017 and filed on even date. He principally sought a declaration that he had acquired title over the suit land through adverse possession and the suit land be transferred to him to hold in trust for the rest of the Plaintiffs.
18. According to the Process Server, Jackson Mutinda's Return of Service sworn on 18/4/2018 and filed on 8/5/2018 outlined the steps he took to serve the Defendant herein who directed him to serve the firm of Gathii Irungu & Co. Advocates.
19. Vide a letter dated 5/4/2018 to the Deputy Registrar of this Court, the Plaintiff requested for judgment in default of against the Defendant whereupon the suit was then set down for formal proof hearing on 29/5/2019.
20. The *Civil Procedure Rules* does not expressly provide for setting aside of proceedings like it does for setting aside of *ex parte* judgement or orders. It is however trite that such a prayer can only be granted in exercise of Court's discretionary power to ensure ends of justice are met. In the celebrated case of *Shah v Mbogo & Another* [1967] EA 116 the Court of Appeal of East Africa held that:

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
21. The legal threshold to consider before exercising the said discretion is whether the Applicant has demonstrated a sufficient cause warranting setting aside of the *ex-parte* decision or proceedings. In *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J held that sufficient cause is a question of fact and the Court has to exercise its discretion in the varied and special circumstances in the case at hand. That there cannot be a straight-jacket formula of universal application.
22. The Applicant has strongly averred that he was never served with Court pleadings despite a filed Return of Service outlining how service was affected. The 7th Plaintiff on the other hand contends that the Defendant was properly served through his daughter and firm of Gathii Irungu & Co. Advocates. Order 5 rule 12 of the *Civil Procedure Rules* provides;

“12. Service on agent or adult [Order 5, rule 12.]

Where in any suit, after a reasonable number of attempts have been made to serve the Defendant, and Defendant cannot be found, service may be made on an agent of the Defendant empowered to accept service or on any adult member of the family of the Defendant who is residing with him.”
23. A glean at the Return of Service filed by Jackson K. Mutinda, Process server on 8th May 2019 at para. 7 states that he went to the office of Gathii Irungu & Co. Advocates and served the pleadings upon its Secretary a Ms. Peninah. That the deponent then returned the received and stamped copies to this



- Honorable Court as proof that they were duly served. However, no such copies of the served pleadings were annexed to that effect. The only annexure thereof is the process server's License.
24. This is contrasted with the 7th Plaintiff's averment at para. 11 of his Replying Affidavit sworn on 9/10/2020 that the Defendant counsel was served by the process serve as shown by annexure EMN1, copy of the received Originating Summons. No explanation has been given as to why Jackson K. Mutinda failed to annex the received copies since he is the one who is best suited to prove the assailed service as opposed to the 7th Plaintiff himself. The totality of the foregoing is that there is doubt in the mind of this Court as to the alleged service upon the Defendant.
 25. On whether the Defendant may be allowed to file his pleadings out of time, the right to fair hearing is protected under Article 50 of the Constitution of Kenya. A party is at liberty to file its pleadings any time before close of pleadings and thereafter with leave of Court. The discretion to set aside *ex-parte* proceedings and/or order must be done upon terms which are fair to both parties. Whereas the prejudice suffered by the Plaintiff in prosecuting this case this far may be compensated by damages, the denial of the right to fair hearing may not be easily quantified.
 26. The Plaintiff urged the Court to consider whether the draft defence raises triable issues, in my view the same is not obligatory because there is no *ex parte* judgment in place yet. See the case of Joshua Mulungu Mutie & Another v County Government of Machakos [2018] eKLR where the Court allowed a similar application so as to accord both parties a fair hearing.
 27. On whether the Court may order for a site visit, the prayer is premature in my view because nothing has been placed on record yet for the Court to consider its efficacy.
 28. In exercise of the discretion bestowed upon this Court and guided by the provisions of Articles 48 and 159 (2) (d) of the Constitution of Kenya and Sections 1A, 1B and 3A of the Civil Procedure Act, it is in the best interest of justice to allow the Application in the foregoing terms;
 - a. Leave is hereby granted to the Defendant to enter his appearance and file his pleadings out of time within the next 15 days.
 - b. The Plaintiff is granted corresponding leave to respond to the Defendant's pleadings within 15 days upon service.
 - c. The Plaintiffs' case be re-opened and their witnesses be recalled to allow the Defendant to cross examine them.
 - d. The Defendant to pay the Plaintiffs throw away costs in the sum of Kshs. 20,000/= within 30 days from today.
 - e. In default of (a) and (d) above this application shall stand dismissed.
 29. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 9TH DAY OF JUNE 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mutunga for 1st – 12th Plaintiff/Respondent

Ms. Kandenge holding brief for Makaka for Defendant/Applicant



