



Atabo (Suing as the Legal Representative of the Estate of the Late Sarah Atambo Esiron) v Land Registrar, Kitale & another (Environment & Land Case 54 of 2021) [2022] KEELC 3598 (KLR) (20 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3598 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 54 OF 2021**

**FO NYAGAKA, J
JULY 20, 2022**

BETWEEN

**CATHERINE ORONDO ATABO PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE
SARAH ATAMBO ESIRON**

AND

**LAND REGISTRAR, KITALE 1ST DEFENDANT
BEN WAFULA WANJALA 2ND DEFENDANT**

RULING

The Application

1. The 2nd Defendant's Notice of Motion Application dated April 13, 2022 and filed on April 20, 2022 invoked the provisions of the *Civil Procedure Act* under Section 1B and 3A as well as Order 22 Rule 22 and Order 10 Rule 11 of the *Civil Procedure Rules*. It seeks the following reliefs:
 1. ...spent.
 2. That this Honorable Court be pleased to set aside *ex parte* judgment entered on January 13, 2022 herein plus all consequential orders.
 3. That this Honorable Court be pleased to grant the Applicant leave to file and serve his Defence and Counterclaim out of time.
 4. ...spent.
 5. That the process server Mueke Jeremiah be summoned to court for cross-examination.



6. The costs of this Application be provided for.
2. The Application was premised on the grounds on the face of it and supported by the 2nd Defendant's Affidavit. The Applicant maintained that he was not served with summons to enter appearance. He discovered the matter when he was called by George Mumali, a court process server. He argued that he is the absolute registered proprietor of parcel number Kitale Municipality Block 16/Kaura Wa Bechau/75. He annexed a sale agreement entered into between himself and the deceased Sarah Atambo Esiron and a copy of the title in his name marked BWW-1(a) and (b) respectively. He took immediate possession in 1990. He added that he has been in peaceful, continuous and uninterrupted occupation of the land for more than thirty two (32) years within the Plaintiff/2nd Respondent's knowledge. He challenged that the 2nd Respondent has never filed succession proceedings. Based on these, he stated that he had a good Defence against the 2nd Respondent which was annexed and marked BWW2. He remained emphatic that he had never been served with any documents appurtenant to this suit including a Notice to Show Cause. He argued that he would suffer injustice and prejudice since he will be condemned unheard. In view of the foregoing, he urged this court to allow the Application as prayed as it was with merit.

The Response

3. The Plaintiff/2nd Respondent vehemently opposed the Application. She relied on the Replying Affidavit of Kakai Mugalo & Company, her Advocates on record filed on May 09, 2022.
4. In it, it was disclosed that service was properly effected from the onset of this matter. A licensed process server by the name Mueke Jeremiah served the Applicant with a demand letter via the Applicant's last known WhatsApp Mobile No 0723177131. The Applicant was later served with an Application for substituted service in the same manner. When the court allowed the 2nd Respondent to serve by way of substituted service, she did so by way of advertisement in two local dailies, that is the Daily Nation and the Standard Newspaper. Once the court was satisfied as to service, the 2nd Respondent requested for and was granted ex parte judgment against the Applicant on January 13, 2022. In spite of the above, Counsel for the 2nd Respondent continued to serve the Applicant with pleadings in this matter. These included the Application dated March 07, 2022 and the orders of March 24, 2022. She annexed the WhatsApp screenshots, returns of service and printouts from the local dailies in support of her disposition and were marked KK-1 to KK-6.
5. Later on April 08, 2022 and April 09, 2022, the Applicant acknowledged through WhatsApp No 0723177131 that he was in receipt of the messages but had since misplaced the documents and requested for fresh service. He further called the process server using the same number. She annexed further screenshots from WhatsApp on this which were marked KK-7 and KK-8. The 2nd Respondent maintained that the Applicant was estopped from challenging service as proper service had been effected throughout the matter. Consequently, the 2nd Respondent urged this court to decline invoking its discretionary powers. It was further deposed that it was untenable to cross-examine the process server as the court granted the 2nd Respondent leave to serve by way of substituted service.
6. She relied on the surveyor's report dated 28/04/2022 to conclude that the Applicant illegally encroached on the Plaintiff's property namely Kitale Municipality Block 16/Kaura Wa Bechau/74. It was deposed that the Defence raised no triable issues. Finally, it would be a waste of the court's time if the judgment is set aside.



Further Affidavit

7. In his further Affidavit filed on May 12, 2022, the Applicant disputed proper service. He noted that the 2nd Respondent did not dispute that he was the legal proprietor of Kitale Municipality Block 16/ Kaura Wa Bechau/75. He maintained that the evidence of the surveyor would be critical after the court hears both parties. He reiterated the contents of his Application. He urged this court to allow the Application as prayed.

Submissions

8. In his submissions dated April 21, 2022 and filed on April 26, 2022, the Applicant replicated his Application. He opposed the substituted service arguing that it ought to only have been granted where it was established that he could not be traced at his place of abode or at work. He submitted that the 2nd Respondent stood to suffer no prejudice if the orders sought were granted.
9. The 2nd Respondent submitted that the Application was an afterthought and the Applicant was not deserving of the orders sought. The delay was inexcusable as the 2nd Respondent was allowed to file a report by the Land Survey Trans Nzoia County. She submitted that no cogent reasons had been furnished to justify the invocation of the court's discretionary powers to set aside the *ex parte* judgment. Since at the heart of the dispute lay the issue of boundary claims, the 2nd Respondent maintained that there was no triable issue in the matter left as the Land Surveyor's reported dated 28/04/2022 validated the 2nd Respondent's position. She urged this court to dismiss the Application with costs.

Analysis and Disposition

10. I have considered the Application and the parties' Affidavits. I have also considered the parties' rival submissions. Following the Applicant's failure to file its memorandum of appearance and statement of Defence, the 2nd Respondent accordingly proceeded to request for judgment against the Applicant. The said request was endorsed on January 13, 2022 when the court entered interlocutory judgment against the Applicant. It is this action that instigated the filing of the present Application.
11. This discretionary power to set aside *ex parte* judgment in default was discussed in the Court of Appeal case of [Pithon Waweru Maina v Thuka Mugiria](#) [1983] eKLR, where Kneller JA observed as follows:

“The former relevant order and rules were order IX rules 10 and 24. The court has no discretion where it appears there has been no proper service; *Kanji Naran v Velji Ramji* [1954] 21 EACA 20: and the power to set aside the judgment does not cease to apply because a decree has been extracted: *Fort Hall Bakery Supply Company v Frederick Muigon Wargoe*[1958] EA 118.

The court has a very wide discretion under the order and rule and there are limits and restrictions on the discretion of the judge except that if the judgment is varied it must be done on terms that are just: *Patel v EA Cargo Handling Services Ltd* [1974] EA 75, 76 BC.

This discretion is intended 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: *Shah v Mbogo*[1969] EA 116,123 BC Harris J.

The matter which should be considered, when an application is made, were set out by Harris J in *Jesse Kimani v McConnel* [1966] EA 547, 555 F which included, among other matters, the facts and circumstances, both prior and subsequent, and all the respective merits of the



parties together with any material factor which appears to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been *ex parte* and whether or not it would be just and reasonable to set aside or vary the judgment, upon terms to be imposed. This was approved by the former Court of Appeal for East Africa in *Mbogo v Shab* [1968] EA 93, 95 F. There is also a decision of the late Sheridan J in the High Court of Uganda in *Sebei District Administration v Gasyali* [1968] EA 300,301,302 in which he adopted some wise words of Ainley J, as he then was, in the same court, in *Jamnadas v Sodha v Gordandas Hemraj* (1952) 7 ULR 7 namely: “The nature of the action should be considered, the defence if one has been brought to the notice of the court, however, irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court.” And, because it is a discretionary power it should be exercised judicially, or in the Scots phrase, used by Lord Ainslie in *Smith v Middleton* [1972] SC 30: “... in a selective and discriminatory manner, not arbitrarily or idiosyncratically,” for otherwise, as Lord Diplock said in his speech in *Cookson v Knowles* [1979] AC 556: “... the parties would become dependent on judicial whim ...” So the magistrate should have recalled these points. The respondent has a judgment which was not obtained by consent or as the consequence of a trial. The nature of the action is one that concerns land and who purchased it first and whether or not consent of the local land control board to the transaction was necessary and obtained by either of them and, altogether, it is not a trivial matter. A defence was before the court in time which was not dealt with at the trial. The respondent could have been compensated by costs for the delay occasioned by his advocate’s dilatoriness and the appellant should not have been denied a hearing because of his advocate’s mistake even if it amounted to negligence, in the circumstances of this case. *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48, 51 and Hancox J (as he then was) in *Gurcharan Singh s/o Kesar Singh v Khudadad Khan t/a Khudadad Construction Company Nairobi* HCCC 1547 of 1969. The magistrate did not take these matters into consideration when he exercised his discretion. So the learned judge was entitled to interfere with the decision of the magistrate although it was a discretionary one. See Brandon LJ in *The El Amria* [1981] 2 Lloyd’s Rep 539.”

12. I am further guided by the case of *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75 that held:

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as SHERIDAN J. put it “a triable issue” that is an issue which raises a *prima facie* defence and which should go to trial for adjudication.”

13. Flowing from the above, the court is duty bound to establish whether there is a regular judgment. If it is irregular, the same will be set aside without any further reference. However, if the judgment entered was regular, the court will be tasked to establish whether the Defence raises triable issues necessitating a setting aside order. I will now proceed to determine the Application accordingly as follows:



(a) Whether there is a regular judgment on record.

14. The Applicant's assertions were that he was never served with summons to enter appearance. He only became aware of the matter when he was called by a process server called George Mumali. He contended that he was not aware of service by substituted means maintaining that the 2nd Respondent ought to have taken considerable steps to serve him at his residence or place of work.
15. The 2nd Respondent conversely maintained that the Applicant was properly served with summons by way of substituted service. She added that pursuant to Order 5 Rule 22C of the Civil Procedure Rules, the Applicant was on several occasions served with pleading via his WhatsApp Mobile No 0723177131. In fact, he admitted on April 08, 2022 and April 09, 2022 that he had been receiving the messages but requested to be served with pleadings afresh.
16. I note from the proceedings that when the 2nd Respondent observed that she was unable to effect personal service upon the Applicant, she moved this court by way of Application. The court was satisfied that the 2nd Respondent had aptly demonstrated that she experienced difficulties in serving the Applicant. It was premised on those grounds that the 2nd Respondent served the Applicant by way of substituted service in the local dailies. Following thereafter, and being satisfied with proper service, the court entered interlocutory judgment against the Applicant on January 13, 2022.
17. I also take note of the Applicant's admissions on April 08, 2022 and April 09, 2022. While the Applicant has remained adamant that he was never served with any pleadings, he admitted from the WhatsApp screenshots that he was indeed in receipt of the documents but had misplaced them. The Applicant cannot have his cake and eat it. It was evident that he was well aware of the proceedings in this matter but chose to remain indolent.
18. In the end, I find that the 2nd Respondent had at all times material to the suit effected proper service. Thereafter, based on that satisfaction, interlocutory judgment was entered against the Applicant. I thus conclude that the said judgment against the Applicant examined regular.

(b) Whether the Defence raises triable issues

19. Notwithstanding that there is a regular judgment on record, the interest of justice dictate that my main concern is to interrogate whether it is in the interest of justice that the regular judgment be set aside. Consequently, I must determine whether I am satisfied that there is a Defence on the merits. A Defence on the merits is one that raises a triable issue that necessitates that the matter proceeds for trial on its merits. In this regard, only one (1) triable issue will sufficiently set aside *ex parte* orders.
20. In his draft Defence, the Applicant averred that he purchased his parcel of land from the deceased who was the Plaintiff's mother. He further added that the legality in occupation of the land which he bought from the deceased remained so. He further averred that the suit was premature. He reserved the right to raise a Preliminary Objection to strike it out.
21. The 2nd Respondent responded to averments in her Replying Affidavit. She maintained that the Applicant had encroached on the suit land according to the surveyor report. She maintained that he added unto himself an excess of 1.16 acres illegally.
22. The above sentiments raised by the 2nd Respondent lead me to conclude that triable issues have been raised. It may well be within the Applicant's right to explain, if at all, the allegations pitted against him. The doctrine of audi alteram partem and the provisions of the Constitution oblige this court to let all parties be heard. The Defence raises triable issues that can only be determined in a full hearing where



parties present their evidence. For these reasons, I find that the Defendant has sufficiently demonstrated that there are triable issues that call for adjudication.

Orders and Dispositions

23. Having said that, I also come to the conclusion that since service was by way of substituted service, the prayer seeking to cross examine the process server is unwarranted.
24. In light of the above, I make the following consequential orders:
 - (1) The *ex parte* judgment entered on January 13, 2022 and all consequential orders be and are hereby set aside.
 - (2) The 2nd Defendant shall pay the Plaintiff thrown away costs in the sum of Kshs 30,000.00 within the next fourteen (14) days from the date of this order failing which the orders in 1 shall automatically lapse without any further reference to the court.
 - (3) Thereafter, the Defendant shall file and serve his draft Defence within seven (7) days from the date of this order.
 - (4) The matter shall be mentioned on October 06, 2022 to confirm compliance with the above orders and take further directions as to compliance with Order 11 of the [Civil Procedure Rules](#).

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 20TH DAY OF JULY, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

