



**Hosea (suing on behalf of the Estate of Hosea Songa - Deceased) v Ajwang & 2 others
(Environment & Land Case 1 of 2022) [2022] KEELC 2602 (KLR) (19 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2602 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 1 OF 2022
GMA ONGONDO, J
JULY 19, 2022
(FORMERLY MIGORI ELCC NO. 46 OF 2018)**

BETWEEN

**MARY ACHIENG HOSEA (SUING ON BEHALF OF THE ESTATE OF HOSEA
SONGA - DECEASED) PLAINTIFF**

AND

SETH OKECH AJWANG 1ST DEFENDANT

BEN OYUGA ADYANG 2ND DEFENDANT

COUNTY LAND REGISTRAR-HOMA BAY 3RD DEFENDANT

RULING

1. By a Notice of Motion dated 9th December 2021 brought under, inter alia, sections 1A, 1B and 3A of the *Civil Procedure Act* Chapter 21 Laws of Kenya and section 68 (1) of the *Land Registration Act*, 2016 (2012) (the application herein), the 2nd defendant, Ben Oyuga Adyang (the applicant) through AKO Advocates LLP is seeking the following orders;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That upon hearing of this application inter parte, the court does issue an order setting aside the ex parte proceedings, the judgment and the decree issued in this matter.
 - e. That upon hearing and determination of this application inter parte, the applicant be granted leave to file his defence out of time.



- f. That the costs of this application be paid for by the plaintiff
2. The application is founded upon grounds (a) to (l) stated on the face of the same. It is further anchored on the applicant's supporting affidavit of fourteen paragraphs of even date and the decree, green card, Standard Newspaper public notice and a draft copy of the defence being documents marked as BOA1(a), BOA1(b), BOA2 to BOA3 respectively annexed to the affidavit. In a nutshell, the applicant's complaint is that the plaintiff/respondent filed this suit and obtained an ex-parte judgment without his knowledge. That therefore, the said judgment was irregularly obtained as summons to enter appearance and the plaint were never served on him. That the alleged substituted service by the plaintiff was done without leave of the court contrary to the provisions of the law. That the decree herein has been executed and if the inhibition sought is not granted, he is likely to suffer great prejudice. That the applicant has a right to fair determination of this dispute on merits hence he be allowed to file his defence that raises triable issues.
 3. The respondent, Mary Achieng Hosea through the firm of Agure Odero and Company Advocates, opposed the application by way of his replying affidavit sworn on 15th February 2022 duly filed in court on 16th February 2022 and a copy of public notice (MAH 1) and title deed in respect of the suit land, LR No. Kanyada/Kotieno A//1625(MAH 2) annexed thereto. She deposed, inter alia, that the defendants including the applicant were duly served by way of substituted service as disclosed in the said notice. That upon judgment herein, she followed requisite steps and obtained the title deed.
 4. The respondent averred that litigation has to come to an end. That she complied with the provisions of the law and the court was satisfied thereof thus, allowed the matter to proceed ex parte. That the draft defence is hot hair and it be expunged from the court record. She urged the court to dismiss the application with costs.
 5. The application was heard by way of written submissions further to this court's directions of 19th January 2022; see Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction number 33 of the Environment and Land Court (ELC) Practice Directions, 2014.
 6. Accordingly, learned counsel for the applicant filed submissions dated 2nd March 2022. Briefly, counsel gave the facts of the matter and framed twin issues for determination namely whether the court should grant the orders stated as in paragraph 1 (d) and (e) hereinabove. Counsel then discussed the said issues in favour of the orders sought in the application.
 7. To reinforce the submissions, reliance was made on Order 5 Rule 17 (1) of the *Civil Procedure Rules, 2010* as well as Order 10 rule 11 of the same Rules. Counsel also cited *Mwala-vs-Kenya Bureau of Standards* (2001) 1 EA 148, *Philip K.Chemwolo and Mumias Sugar Company Ltd-vs-Augustine Kubende* (1986)eKLR, *Films Role International & others-vs-Cannon Films Sales Ltd* (1968) 3 ALL ER 772 cited in *Dorcas Muthoni and 2 others-vs-Michael Ireri Ngari* (2016) eKLR, Section 68 (supra) and Paragraph 32 of the ELC Practice Directions, 2014 therein.
 8. By the submissions dated 18th April 2022 and filed herein on 19th April 2022, learned counsel for plaintiff/respondent stated that the applicant would have filed a case against the 1st defendant who is not a party to this application which is a lame duck. That the court is functus officio and litigation must come to an end.
 9. To fortify the submissions, counsel cited Article 159 of *the Constitution* of Kenya, 2010 (*The Constitution* herein) and that the applicant confirmed that substituted service was done as required by the law. It was submitted that the application is hollow, incompetent and cannot see the light of day. That the same is therefore, unmerited and it be dismissed with costs to the respondent.



10. I have duly considered the application, the replying affidavit and the rival submissions in their entirety. So, is the application meritorious?
11. It is important to note that the application was originated pursuant to section 68 (1) (supra) which governs the court's discretion to grant inhibition orders concerning any land. Section 13 (7) (a) of the ELC Act, 2015 (2011) provides for this court's mandate to grant preservation orders inclusive of inhibition orders sought in the application.
12. It is also noteworthy that the applicant and others were duly served as discerned at paragraph 3 of this court's judgment which reads;

“The defendants were duly served as disclosed in an affidavit of service sworn on 5th November 2018 by the plaintiff's counsel. However, they neither entered appearance nor filed a statement of defence herein.”
13. On that score, the judgment sought to be set aside is a regular one. In the premises, it is within the unlimited discretion of this court to set aside or vary the same as held in *Mwala and Chemwolo* cases (supra).
14. The draft defence raises the issue of innocent purchaser. However, there is a regular judgment in place in this matter. It is common ground that pursuant to the judgment, a decree has been executed as shown in the green card marked as BOA1b annexed to the affidavit in support of the application and title deed marked as MA2 annexed to the replying affidavit.
15. Plainly, the plaintiff/respondent has a vested right to the judgment which has been effectual as noted in the case *Shahmad-vs-Shamji Bros and another* (1957) EA 438. Therefore, the application is an attempt to close the stable after the horse has bolted.
16. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system; see [*James Kanyiita Nderitu and another-vs-Marios Philotas Ghikas and another*](#) (2016) eKLR and *Chemwolo* case (supra).
17. Articles 48 and 50 (1) of [*the Constitution*](#) provide for access to justice and fair hearing respectively. The applicant was made aware of the existence of this suit and was afforded an opportunity to be heard in the matter as stated in paragraph 12 hereinabove; see also *Ogada-vs-Mollin* (2009) KLR 620.
18. In the case of [*Raphael Musila Mutiso and 3 others-vs-Joseph Ndava Ntbuka and another*](#) 2019 eKLR, the Court of Appeal observed that delay for a day will result in dismissal of a matter if not explained. It must be noted that the applicant has not explained the inordinate delay of about six months to mount this application hence it must fail.
19. Moreover, the suit was heard in accordance with Article 159 (2) (b) of [*the Constitution*](#) which stipulates that;

“Justice shall not be delayed.”
20. It is a fundamental principle that the court should take the lower risk of injustice as stated in *Films* case (supra). In that regard, this court is in absolute agreement with the respondent that the cardinal principle is that litigation in this matter has to come to an end; see *Halsbury's Laws of England* (4th Edition) Volume 22 page 273.
21. In the premises, it is the finding of this court that this application is devoid of merit. I proceed to disallow the same with costs to the plaintiff/respondent.



22. It is so ordered.

DELIVERED, DELIVERED AND SIGNED IN OPEN COURT AT HOMA BAY THIS 19TH JULY, 2022.

G.M.A ONGONDO

JUDGE

Present;

- a) Mr C Migele holding brief for Mandela Migele, learned counsel for the 2nd defendant/applicant
- b) Mr Agure Otero, learned counsel for the plaintiff/respondent
- c) Okello, court assistant

