



**Njoroge v Ngeruro & another (Environment & Land Case
E002 of 2021) [2022] KEELC 2677 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2677 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E002 OF 2021**

LN GACHERU, J

JULY 14, 2022

BETWEEN

BENSON NDIRIKA NJOROGE APPLICANT

AND

ELIZABETH NJERI NGERURO 1ST RESPONDENT

DAVID NJOROGE NGERURO 2ND RESPONDENT

RULING

1. The 2nd Respondent/Applicant by a Notice of Motion dated February 2, 2022, sought the following orders;
 1. Spent
 2. Spent
 3. That pending the interparties hearing of the main suit, this Honourable Court do issue orders restraining Murang'a Land Control Board from either by himself, his servant and or agents from issuing letters of consent to the Applicant transferring LR Loc 8/kionjoine/1082, until final hearing and determination of this suit.
 4. That the costs of this suit be provided for.
2. The Application is premised on the grounds stated on the face of it and the Supporting Affidavit of David Njoroge Ngeruro (the Applicant) sworn on February 2, 2022. It is the Applicant's disposition that he was not served with the Originating Summons filed in this Court on April 8, 2021, and asked the Process Server who claimed to serve him be put on the stand for cross examination. That LR Loc 8/kionjoine/1082, was under succession in the High Court at Murang'a in Succession Cause No 609 of 2013, and judgment for the succession cause was entered in the Succession Cause on May 20, 2016, and title deed was issued over the suit land was barely 3 years old.



3. The Application is contested via a Replying Affidavit sworn by Benson Nditika Njoroge, the Plaintiff/ Respondent herein on February 14, 2022. It is the Respondent's contention that the application is frivolous, vexatious and an abuse of the Court process. That the Application is grossly misconceived as it seeks orders against persons who are not parties to this suit and the 1st Respondent who died sometime in 2020. That the orders sought are underserving as it only seek to frustrate the execution of a legal judgment of this Court. That this Court heard and determined the issues at hand in the Originating Summons and a consent Judgment was entered to the effect that LR Loc 8/ kionjoine/1082, belonged to him after he purchased the same in 1996. That the Applicant is conniving with Rahab Wangari, a member of Kahuro Land Control Board, to ensure that the Judgment of this Court is not executed. The Respondent contended further that he is well over 100 years and he should therefore be allowed to enjoy the fruits of his Judgment before his demise.
4. The Applicant made a rejoinder via a Further Affidavit sworn on March 23, 2022, and reiterated his averments in the Notice of Motion and Supporting Affidavit.
5. Before the application dated February 2, 2021, could be heard and determined, the 2nd Respondent/ Applicant filed another Notice of Motion Application dated April 19, 2021 and sought for orders that;
 1. The Judgment of the Court entered on September 14, 2021, be set aside and the matter be heard afresh.
 2. The Replying Affidavit filed herein be deemed as filed as a response to the Originating Summons filed in this Court on April 6, 2021, by the Respondent.
 3. That the Caution placed over LR Loc 8/kionjoine/1082 and withdrawn by the Land Registrar via Court order be reinstated.
 4. That there be cancellation of all transmissions/ subdivisions or transfer of LR Loc 8/ kionjoine/1082 from the original owner and the same be reinstated to Elizabeth Njeri Ngeruro.
6. The Application is premised on the five grounds appearing on the face of it and the Supporting Affidavit of David Njoroge Ngeruro (the Applicant) sworn on April 19, 2022. It is the Applicant's disposition that he came to know of the existence of this case after some people in Kahuro Land Control Board informed him that the Plaintiff/Respondent had applied for transfer of the suit land. That out of shock, he filed the application dated February 2, 2022, and subsequently the instant application to address the issue of the withdrawn caution.
7. The Application is contested via a Replying Affidavit sworn by J Mwangi Ben, Advocate for the Plaintiff/Respondent herein on April 21, 2022. It is Mr Mwangi's contention that the application is frivolous, vexatious, and an abuse of the Court process. That for all intents and purposes, this is a concluded matter with a final judgment of the Court. That no legal orders or proceedings can properly issue as there is a legal and necessary party who is deceased. That litigation must come to an end and the Court should intervene to prevent a miscarriage of justice. That the Applicant was served with the Summons herein and was well aware of the suit and it is insincere of him to await the demise of the principal party to deny service. That the Applicant claims an interest over the suit land which interest he has never perfected. That the removal of caution by this Court was right, necessary, judicious and most reasonable in the circumstances.
8. The Court directed that both applications be canvassed by way of written submissions. The 2nd Respondent/Applicant acting in person filed his written submissions dated May 12, 2022, on May 19, 2022. In his submissions, the Applicant reiterated his averments in the Notice of Motion application



and the Supporting Affidavits thereto and urged this Court to allow the instant applications as prayed. Similarly, the Plaintiff/Respondent filed his written submissions dated May 16, 2022, through the Law Firm of Kirubi, Mwangi Ben & Co Advocates.

9. The Court has considered the pleadings in general, the rival written submissions and the relevant provisions of law and finds the main issue for determination is whether the Applications dated February 2, 2022 and April 19, 2022, are merited.
10. Before delving into the issues for determination in the instant applications, it is important to lay a background of how they came about.
11. The instant suit was originated via an Originating Summons dated April 8, 2021, and the Applicant/Respondent therein sought for adverse possession orders against the 1st and 2nd Respondents herein. The Summons upon being filed were served on both Respondents and an Affidavit of Service sworn on April 14, 2021, by one Simon G Kamau, was filed to that effect. Upon service, the 1st Respondent entered appearance via a Memorandum of Appearance dated April 23, 2021. The 2nd Respondent however failed to enter appearance and on May 27, 2021, the Applicant/Respondent filed a request for judgment against him. On the other hand, the 1st Respondent conceded the suit against her and a consent dated May 4, 2021, was filed in this Court on 11th May 2021. The said consent was subsequently adopted as an order of this Court on May 26, 2021.
12. In addition, the Applicants request for judgement was placed before the Deputy Registrar on June 14, 2021, and it was allowed and the matter was slated for formal proof hearing on July 13, 2021. On the said July 13, 2021, the matter was heard in the absence of the 2nd Respondent and the Applicant was directed to file written submissions. Subsequently, the matter was mentioned on August 4, 2021, and it was reserved for judgment on September 14, 2021, in the absence of all the parties. Judgment on Notice was served upon the Applicant and the 1st Respondent on August 11, 2021 and August 16, 2021 respectively. On September 14, 2021, the Court entered judgment in favour of the Applicant against the 2nd Respondent to the effect that the caution placed on the suit land by the 2nd Respondent be withdrawn.
13. It is this Judgment that jerked the 2nd Respondent/Applicant herein into action prompting him to file the instant applications. What flows from the Pleadings herein and the Court Record is that Elizabeth Njeri Ngeruro was the registered owner of the suit land, more specifically LR Loc 8/kionjoine/1082. That David Njoroge Ngeruro, the Applicant herein placed a caution over the suit land claiming an interest over the same. That Benson Nditika Njoroge, via the instant suit sought orders for adverse possession against the Respondents and a Judgment was entered in his favor against the Respondents.
14. While the 1st Respondent participated in the trial, the 2nd Respondent did not participated and the suit progressed and was concluded in his absence. The 2nd Respondent/Applicant has now moved to this Court seeking to set aside its earlier Judgment and that he be allowed to file his response to the Originating Summons. In addition, he seeks that the caution that he had placed on the suit land be reinstated as the same was withdrawn pursuant to the Judgment of this Court which he prays that it be set aside.
15. The 2nd Respondent/Applicant's application is opposed by the Applicant/Respondent on account that this Court has already delivered a Judgment and it is therefore functus officio. That the 2nd Respondent/Applicant herein was indeed aware of the instant suit and he was even served with the pleadings and he cannot be allowed to benefit from his ignorance and/or misdeeds. That a necessary party to this proceeding to wit the 1st Respondent has since passed away and is yet to be substituted.



16. From the Pleadings, it is evident that the Judgment that the 2nd Respondent/ Applicant seeks to set aside is the one entered on September 14, 2021. To wit the said judgment lifted the Caution placed on the suit land by the Applicant herein.
17. The Courts are guided by the provisions of Article 159(2)(d) of the Constitution and Sections 1A and 1B of the Civil Procedure Act in administering justice. The focus being on substantive justice, rather than procedural technicalities, and the just, efficient and expeditious disposal of cases.
18. Order 10, of the Civil Procedure Rules, 2010, addresses the issue of consequences of non-appearance, default of defence and failure to serve by a party. Order 10, rule 4 empowers Courts to enter interlocutory judgment in cases where the plaint is drawn with a claim for pecuniary damages only or for detention of goods, with or without a claim for pecuniary damages. On the other hand, rule 9 gives the Plaintiff the leeway to set down a suit for hearing where no appearance is entered for other suits not provided for by this Order. Order 10, rule 10 provides that in cases where a Defendant has failed to file a Defence, rules 4 to 9, shall apply with any necessary modification. While Rule 11 empowers the court to set a side or vary a judgment, that has been entered under Order 10.
19. Based on the above, it is trite that setting aside of an ex parte judgment is the discretion of the court and in so doing, such discretion is unfettered but the same should be exercised judiciously and not capriciously – see the case of Kenya Pipeline Company Limited v Mafuta Products Limited [2014] eKLR and that of Shah v Mbogo (1967) E A 166, where the Court held that:

“ This discretion to set aside as exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it’s not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. “29”. However, the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit.
20. The principles upon which the Court’s discretion to set aside an Interlocutory Judgment and or order is exercised are largely settled. In considering such an application, the overriding interest of the court is to do justice to the parties. The discretion is exercised in order to ensure that a litigant does not suffer injustice or hardship as a consequence of inter alia an excusable mistake or error on his part and or his advocate. The same however ought not to be exercised in favour of a party seeking to deliberately obstruct or delay the course of justice. The court is bound to consider the reason(s) advanced by the party seeking the exercise of discretion as to why the action resulting into the entry of the interlocutory judgment or order was not taken. Similarly, it will also interrogate the delay and or prejudice occasioned to the party in whose favour the interlocutory judgment has been made and whether an award of costs will adequately compensate him.
21. Besides, the court is also called upon to bear in mind whether the party seeking the exercise of discretion has a Defence on the merits and that denying a litigant a hearing should be an action of last resort. In doing so, the court must also look at the conduct of the parties to the suit as well. (see the case of Gelu Unicrafts Limited & 2 others v Usafi Services Limited [2017] eKLR where the Court of Appeal cited



with approval the case of *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio* [2015] eKLR. where it was held that;

“...The court’s power under Order X rule 11 of the rules is quite wide and unfettered, subject to the dictates of justice. But like all judicial discretions, it will not be exercised whimsically but upon settled principles. The principles here include that the power will be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. The power will not be exercised 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) (sic). The court will also consider the nature of the action, the defence, if one has been bought to the notice of the court, however irregularly, whether the plaintiff can reasonably be compensated by costs for any delay occasioned; and all this, bearing in mind that to deny anyone a hearing should be the last resort a court (*Jamnadas Sodha v Gordandas Hemraj* (1952) ULR7. I have considered the above principles in relation to the facts of this case....”

22. In the instant applications, it is the Applicant’s contention that he was not served with the Originating Summons dated April 6, 2021, and he only became aware of the suit after Interlocutory Judgment had already been entered. This Court has perused the Affidavit of Service sworn on April 14, 2021. In the said Affidavit, the deponent alleges that he served the Applicant in Mitindiri Village in Olkalau Sub-County. That the said service was done upon the mother and son, who were the 1st and 2nd Respondents in the Originating Summons.
23. The Applicant however denies the contents of the said Affidavit and prays that the said deponent be put on the stand for cross examination. The said Process Server was not put on the stand and the Applicant had no opportunity to test the veracity of his disposition. For this reasons, this Court will extend grace upon the 2nd Respondent/Applicant and give him the benefit of doubt.
24. In addition, the law requires a process server to return to Court an Affidavit of Service and evidence of such service of summons to enter appearance, which was not done in this case. An Affidavit of Service alone is not evidence of service of process. There is no reason why the Respondent/Applicant only filed into Court and Affidavit of Service and not evidence of service. See Order 10 Rule (2) of the *Civil Procedure Rules*, which provides for Affidavit of Service upon non-appearance as follows: -

“Where any defendant fails to appear and the plaintiff wishes to proceed against such defendant, he shall file an affidavit of service of summons unless the summons has been served by the process server appointed by the Court.”
25. Further, Order 10 Rule 11, provides for setting aside of judgment entered under Order 10. In the case of *Ali Bin Khamis v Salim Khamis Korobe & 2 Others*, [1956] 23 EACA 195, cited with approval in *Gulf Fabricators v County Government of Siaya* [2020] eKLR, it was held inter alia that an order made without Service of Summons to Enter Appearance is a nullity which must be set aside *ex debito justitiae*.
26. Based on the above, this Court is not persuaded that the 2nd Respondent/Applicant was served with the Originating Summons and he chose to ignore the said Summons. Further, the Court notes that the Respondent/Applicant herein did not serve upon the 2nd Respondent/Applicant the Request for Judgment and Formal Proof hearing notice. Since this Court has already found that the Applicant was not properly served with the Originating Summons, it has no reason to doubt that the Applicant was



not aware of the existence of the instant suit. This Court is persuaded by the case of Frigonken Ltd v Value Park Food Ltd, HCC No. 424 of 2010, where the High Court stated:

“If there is no proper or any Service of Summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court *ex debito justitiae*. Such a judgment is not set aside in the exercise of discretion, but as a matter of judicial duty in order to uphold the integrity of the judicial process”.

27. In addition, the right to fair hearing is guaranteed under Article 50 of the Constitution and this Court is duty bound to enforce the same. Having found that the 2nd Respondent/Applicant herein was not properly served with the Originating Summons, it follows that his right to fair hearing was infringed and therefore the Interlocutory Judgment issued on September 14, 2021, was irregular and the same is hereby set aside entirely.
28. Having found that the Judgment of this Court entered on September 14, 2021, was irregular and is hereby set aside, it follows that any actions conducted by the Respondent/Applicant herein in a bid to execute the same are irregular and cannot be sustained.
29. The Upshot of the foregoing is that the Applications dated February 2, 2022, and April 19, 2022, are found to be merited and the same are allowed in the following terms;
 1. The Judgment of the Court entered on September 14, 2021, be and is hereby set aside.
 2. The Replying Affidavit dated April 19, 2022, and filed April 20, 2022 in response to the Originating Summons be and is hereby deemed to be properly filed in this Court
 3. That the Caution placed over LR Loc 8/kionjoine/1082 and withdrawn by the Land Registrar via court order be and is hereby reinstated.
 4. That the Originating Summons application against the 2nd Respondent be set down for hearing within 60 days from the date herein.
 5. The costs of these applications shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 14TH DAY OF JULY, 2022.

L GACHERU

JUDGE

14/7/2022

Delivered virtually in the presence of;

Joel Njonjo -Court Assistant

Plaintiff/ Respondent – Absent

1st Respondent – Absent

2nd Respondent/ Applicant - Absent

L GACHERU

JUDGE



14/7/2022

