



**Nzangu & 3 others v Shukrani Limited & another (Environment & Land Case 77 of 2016 & Environment and Land Miscellaneous Application 49 of 2016 (Consolidated)) [2022] KEELC 4742 (KLR) (31 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 4742 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ENVIRONMENT & LAND CASE 77 OF 2016 & ENVIRONMENT AND**  
**LAND MISCELLANEOUS APPLICATION 49 OF 2016 (CONSOLIDATED)**

**MAO ODENY, J**  
**AUGUST 31, 2022**

**BETWEEN**

**MWINYI SALIM NZANGU ..... 1<sup>ST</sup> PLAINTIFF**  
**MIKE KAINGU KAZUNGU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SHUKRANI LIMITED ..... DEFENDANT**

**AS CONSOLIDATED WITH**

**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 49 OF 2016**

**BETWEEN**

**MWINYI SALIM NZANGU ..... 1<sup>ST</sup> APPLICANT**  
**MIKE KAINGU KAZUNGU ..... 2<sup>ND</sup> APPLICANT**

**AND**

**CHIEF LAND REGISTRAR ..... RESPONDENT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated September 7, 2020 by the Defendant/Applicant seeking the following orders: -
  - a. That the Judgement dated, signed and delivered on November 14, 2016 and the Decree given on November 14, 2016 and issued on November 15, 2016 be set aside.



- b. That the Originating Summons dated March 30, 2016 the Affidavit of Salim Nzagu Bakari in support of the Originating Summons, the authority of the 2<sup>nd</sup> Plaintiff dated March 30, 2016, the Application dated April 14, 2016 referred to in the proceeding of that date, the Affidavit of service drawn by Alando and Co Advocates and sworn by Paul Alando on June 30, 2016 and filed on July 1, 2016, the Notice of change of Advocates by Midikira and Company Advocates dated June 28, 2016 and filed on July 1, 2015, the order given on April 14, 2016 and all proceedings from April 14, 2016 to November 15, 2016 inclusive be struck out with costs.
  - c. The registration of change of ownership over the Suit premises (LR No 404/III/MN registered as CR No 10352) pursuant to the declaration and orders given in the judgement and decree of November 14, 2016 in this Suit be cancelled, the ownership of the Suit premises to revert to Shukran Limited be restored to the Certificate of Title as the registered proprietor.
  - d. The Orders given by this Court in Malindi ELC MISC Application No 49 OF 2016 illegally altering the judgement and decree given in this Suit be declared null and void and be set aside.
2. Before the hearing of this application counsel recorded a consent as follows: -
- a. The application for substitution dated May 4, 2012 be granted in both matters, Mwinyi Salimu Nzangu becomes the 1<sup>st</sup> Plaintiff/Applicant in both matters in place of Salim Nzangu Bakari.
  - b. The 1<sup>st</sup> Plaintiff to file and serve a replying affidavit within 14 days from today on or before October 12, 2021.
  - c. The Defendants in both matters to file and serve a further affidavit together with submissions within 14 days on or before October 26, 2021.
  - d. he Plaintiffs to file and serve their written submissions within 14 days on or before November 10, 2021.
3. The consent was adopted as an order of the court and counsel further agreed by consent that ELC Misc Application No 49 of 2016 be consolidated with ELC No 77 of 2016 with the latter being the lead file and file consolidated submissions which was done.

#### **Defendant's submissions**

4. Counsel relied on the grounds on the face of the application together with supporting and supplementary affidavit of Madan Gopal Aggawal and listed 7 issues for determination as follows: -
- a. Whether the Originating Summons could be heard and determined in the absence of two caveators who had registered caveats against the suit premises on August 31, 2007 and December 20, 2007.
  - b. Whether in view of those caveats the court could hear and determine the Originating Summons without first issuing directions under Order 37 (7) (3) of the Civil Procedure Rules and the consequences of the failure to comply with those provisions.
  - c. Whether the proceedings and orders given on April 14, 2016 were null and void.
  - d. Whether the Originating Summons was served upon the Defendant and if not whether the Defendant was condemned without a hearing in violation of article 25 (c), 48 and 50 (1) of the Constitution of Kenya, 2010.



- e. Whether the Plaintiffs had possession of the suit premises and if not whether they could seek and obtain registration as proprietors under section 38(1) of the Limitation of Actions Act and Order 37(7) of the Civil Procedure Rules.
  - f. Whether the judgment and decree are null and void and whether they should be set aside.
  - g. Costs
5. On the first issue on the Originating Summons counsel relied on Order 37(7) (2) of the Civil Procedure Rules and submitted that there was no proper service of the summons and further that the Plaintiffs were aware that the suit property was encumbered by caveats.
  6. Counsel submitted that the caveators are Timothy Patrick with regard to the caveat dated August 31, 2007, Tarsem Singh Nyota, Durdial Singh Ghataurhae and Govind Meghji who claim purchaser interest. That to enforce their purchasers' interests Tarsem Singh Nyota, Durdial Singh Ghataurhae and Govind Meghji filed Mombasa High Court Civil Suit No 49 of 2008 whereby they obtained a judgment restraining the Defendants as well as Shukran Limited (the Defendant in these proceedings) from transferring or disposing off the suit premises.
  7. It was counsel's submission that the judgment was set aside and a defence and counterclaim relating to the suit premises and further that the Plaintiffs are misleading the Court in their position that Mombasa HCCC No 49 of 2008 is not relevant to the present proceeding as the 2<sup>nd</sup> Plaintiff in his Replying Affidavit annexed the Agreement dated December 5, 1995 upon which the suit is based. The parties to that Agreement are Shukran Limited, the Defendant in this suit and Tarsem Singh Nyota, Durdial Singh Ghataurhae and Govind Meghji hence there are existing proceedings in respect of the same property.
  8. On the second issue whether the court could hear and determine the case with the caveats in place without issuing directions as per Order 37 rule 7 of the Civil Procedure Rules, counsel submitted that such failure rendered the judgment a nullity. Counsel also submitted that the proceedings and orders granted on April 14, 2016 were a nullity as counsel Alando Omondi did not have a valid practicing certificate when he appeared before the court.
  9. Counsel submitted that the Defendant was not properly served as the advert put in the daily Nation does not constitute substituted service as there was no service in terms of the orders given on April 14, 2016. That what the court ordered was that the whole of the Originating Summons, the supporting affidavit and the annexures be published.
  10. Mr Kinyua stated that the Originating Summons and the affidavit should have been published under Order 5 (17) (1) which provides the tools for the interpretation of Order 5 (17) (1) as follows: -

"substituted service under an order of the court shall be as effectual as if it had been made on the 2 personally".
  11. Therefore, publishing a brief notice requiring a Defendant to go to the High Court and pick up documents is not service within the meaning of rule 17.
  12. Mr Kinyua also submitted that the Notice of Motion Application dated October 1, 2021 filed in ELC No 77 of 2016 for substitution of the deceased 1<sup>st</sup> Plaintiff which Motion was supported by an affidavit of Mwinyi Salim Nzagu where the annexed letters of administration to the estate of Salim Nzagu Bakari who was a resident of Kijipwa but the suit premises are in Kikambala. That this shows that Salim Nzagu Bakari was not living in the suit premises.



13. On the Miscellaneous Application No 49 of 2016 counsel submitted that the orders sought had the effect of varying or altering the Judgment and Decree in Malindi ELC suit no 77 of 2016(OS). Further that a Judgment once signed, dated and delivered cannot be altered other than under the provisions of Section 99 of the *Civil Procedure Act*. Jurisdiction under Section 99 is on clerical or Arithmetical mistakes or errors arising from accidental slip or omission.
14. It was counsel's submission that failure by the Plaintiffs to join the Caveators and the Court to order service of the Originating Summons upon the Caveators cannot be termed a clerical or arithmetical mistake or an error arising from accidental slip or omission.

PARA 15.

Mr Kinyua therefore urged the court to allow the application as prayed with costs.

### **Plaintiffs submissions**

16. Counsel relied on the Replying Affidavits filed by the Plaintiff and stated that the Notice of Motion and the Defendant's affidavits should be struck out for lack of authority from the Defendant, Shukran Limited being a company and being in contravention of Order 4 Rule 1 of the *Civil Procedure Rules*.
17. Ms Onyango relied on the case of *Affordable Homes Africa Ltd v Henderson & 2 others* [2004] eKLR and urged the court to dismiss the application as there was no Board resolution appointing the Firm of M/S T K Kariba Mbaru and Company Advocates and M/S Kinyua Muyaa and Company Advocates to represent it in this Suit as well as Misc Civil Application No 49 of 2016.
18. On the issue as to whether the Judgment dated, signed and delivered on November 14, 2016 and the Decree issued on November 15, 2016 should be set aside, counsel submitted that the Defendant has acknowledged that there was substituted service effected on April 20, 2016 in the Standard Newspaper as directed by the court order given and dated April 14, 2016.
19. It was counsel's further submission that the Defendant acknowledged that an Affidavit of service was filed and that there was actual placement of Notice of existence of the Suit in the Standard Newspaper on April 20, 2016 and that the Court was satisfied with the said service and held at paragraph 5 of the judgment that the Defendant was properly served, a holding which the Defendant assert was an error on the part of the Court.
20. Counsel relied on the case of *Nanjibhai Prabhudas & Co Ltd Vs Standard Bank Ltd* [1968] E A(K) 670 where the object and scope of summons to enter appearance was to make the Defendant aware that a suit has been filed against him and to afford him time to appear and follow the process of the law.
21. Ms Onyango submitted that the Court is *functus officio* on the issue of service of summons after the Court held that the Defendant was served and proceeded to hear the matter *ex parte*. Counsel cited the cases on setting aside judgments namely *Remco Limited v Mistry Javda Prabat & Co Ltd & 2 Others* (2002) 1 EA 233, *Shanzu Investments Ltd v The Commissioner of Lands* Civil Appeal No 100 1993, *Tree Shade Motors Ltd vs DT Dobie & Anor* (1995-1998) 1 EA 324
22. On the issue whether the documents filed by Alando & Co Advocates should be struck out on the grounds that the pleadings were drawn and filed by an unqualified person hence null and void, counsel submitted that neither Section 9 nor section 34 of the *Advocates Act* invalidates legal documents, or proceedings prepared by an advocate who does not have a valid current Practising Certificate at the material time.



23. Counsel relied on the case of Supreme Court of Kenya case of *National Bank of Kenya Limited v Anaj Warehousing Limited* [2015] eKLR which judgment was delivered on December 2, 2015 and the effect of the decision necessitated an Amendment to the *Advocates Act* which saw the introduction of Section 34B which provides that: -
 

"the validity of any legal documents drawn or prepared by an advocate who has not taken out a practicing certificate shall not be affected by the failure to obtain a practicing certificate."
24. On the issue whether the registration of title should be cancelled counsel submitted that the Plaintiff obtained title to the suit property through adverse possession, legally permitted pursuant to the provisions of Order 37 Rule 7 of the Civil Procedure Rules and Section 7, 37 and 38 of the *Limitations of Actions Act* Cap 22 Laws of Kenya. The Plaintiffs then filed an Affidavit of Service confirming that service was properly effected as ordered and the Honourable Court went ahead to certify that it was satisfied that the Defendant was served and proceeded to hear the suit *ex -parte*.
25. Counsel for the 2<sup>nd</sup> Plaintiff also filed submissions and reiterated what counsel for the 1<sup>st</sup> Plaintiff had submitted on the issues for determination hence there is no need to repeat.
26. On the issue whether this matter has connection with Mombasa HCC No 49 OF 2008, counsel submitted that the Defendant/Applicant vide its director filed an affidavit and admitted that it is not a party to the suit. Further that the case has no relevance or connection to this case due to the fact that the agreement dated December 5, 1985 between Tarsem Singh Nyota, Durdial Singh Ghataurhae and Govind Meghji was for the purchase of three shares from Shukran Ltd at a price of Kshs 150,000/ each whereby the completion dated was on June 15, 1986 which was later extended to October 31, 1986.
27. Counsel further submitted that the sale agreement only involved shares and not the sale of the suit property where the parties filed suit No 49 of 2008 seeking for a permanent injunction, specific performance and recovery of the amount paid, judgment was entered but was later set aside.
28. Mr Tindika submitted that the deponent in HCC No 49 OF 2008 sought for orders to set aside the caveat/restriction placed on the suit property by the Plaintiff in the said suit and therefore it is grossly misleading to purport to seek the restoration of the caveats in this matter while seeking contrary orders in HCCC No 49 OF 2008.
29. It was Mr Tindika's submission that the Defendant is seeking a raft of orders but it should be noted that the Defendant is not a party to Misc Application No 49 of 2016 hence cannot seek any orders without first being joined as a party as was held in the case of *Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others* [2014] eKLR
30. Counsel urged the court to dismiss the application with costs.

### **Sanalysis and Determination**

31. This is an application for setting aside judgment and decree of the court. The application, the supporting affidavits and submissions are tailored like an appeal of the judgment of the court with a lot of blame being heaped on the court for not doing certain things right in respect of service and hearing and determination of a suit based on the service. The court will only deal with the issue relevant to setting aside judgment as the other orders sought can only be granted when the court has established whether there was proper service or not.
32. The sole issue for determination is whether there was proper service on the defendant.



33. The Applicant has acknowledged that the court gave an order for substituted service and that the same was placed on an advert on a daily newspaper but it was his contention that the same did not comply with Order 5 (17) (1) of the Civil Procedure Rules as the Originating Summons and the affidavit should have been published.
34. In the case of *Shah vs Mbogo* (1967) EA 166 the Court of Appeal established the guiding Principles that a court needs to consider in an application to set aside an *ex parte* judgment. The court stated as follows: -
- "Firstly, there are no limits or restrictions on the judge's discretion to set aside except that if the judge does vary the judgment he does so on such terms as may be just.
- 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. Secondly, the discretion to set aside is intended, to be so exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice".
35. Similarly, in the case of James Kanyiita Nderitu & Another -vs- Marius Phillotas Chikas & Another (2016) eKLR the court of Appeal summarized the criteria upon which the courts exercise discretionary jurisdiction as follows:-
- "In regular default judgment, the defendant will have been served with summons to enter appearance or to file a defence, resulting in default judgment. Such a defendant is entitled under Order 10 Rule 11 of the *Civil Procedure Rules* to move the court to set aside the default judgment and to grant him leave to defend the suit. In such scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be, the length of time that has lapsed since the judgment was entered whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer, whether on the whole; it is in the interest of justice to set aside the default judgment, among others".
36. In this case the defendant was served with summons as acknowledged, the defendant was aware that a case had been filed against it but ignored and alleged that the replying affidavit and he summons were never published. The purpose of summons is to notify a party that a case has been filed against it hence should prepare to file a response to defend the suit as was held in the case of *Nanjibhai Prabhudas & Co Ltd Vs Standard Bank Ltd* [1968] E A (K) 670(*supra*)
37. Once notification is done in a proper way then if a party does not respond, the court if satisfied that the service was done according to the procedure, it will proceed to hear and determine the case without further reference to the Defendant. This is the reason why the Civil Procedure Rules were enacted to provide for specific procedures and consequence for non-compliance with the rules.
38. The Defendant has acknowledged that there was substituted service effected on April 20, 2016 in the Standard Newspaper as directed by the court order granted and dated April 14, 2016 and an affidavit of service filed. I find that Defendant was therefore properly and regularly served with summons to enter appearance hence the *ex - parte* judgment thus was a valid and regular judgment and cannot hence be set aside solely on the ground of non-service of summons to enter appearance.



39. On the issue as to whether documents filed by Alando & Co Advocates should be struck out on the grounds that the pleadings were drawn and filed by an unqualified person hence null and void, I am guided by the provisions of Section 34 B of the *Advocates Act*, which amended Section 34 after the Supreme Court Case of *National Bank of Kenya v Anaj Warehousing Limited* (2015) eKLR (*supra*) which now provides that the validity of any legal documents drawn or prepared by an advocate who has not taken out a practicing certificate shall not be affected by the failure to obtain a practicing certificate.

Section 34B provides as follows: -

Validity of legal documents

- (1) A practicing advocate who is not exempt under section 10 and who fails to take out a practicing certificate in any year, commits an act of professional misconduct.
- (2) Notwithstanding any other provisions of this Act, nothing shall affect the validity of any legal document drawn or prepared by an advocate without a valid practicing certificate.
- (3) For the purpose of this section, "legal document" includes pleadings, affidavits, depositions, applications, deeds and other related instruments, filed in any registry under any law requiring filing by an advocate."

40. On the issue whether there is a connection between this case and HCCC NO 49 OF 2016, I notice that the the Defendant is not a party to Misc Application No 49 of 2016 and that there was no order for joinder hence cannot seek any orders without first being joined as a party as was held in the case of *Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others* [2014] eKLR where the court held that: -

"We cannot exercise our discretion to enjoin a party that disguises itself as an Interested Party, while in actual fact merely seeking to institute fresh cause. On this point, we are guided by the principle which we had pronounced in the *Mumo Matemo* case (at paragraph 24), as follows:

"A suit in Court is a 'solemn' process, 'owned' solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."

[28] In our view, the standards to be applied in considering whether or not the applicant should be enjoined as an Interested Party, have not been established....."

41. The Applicant having admitted that it was not a party to this suit cannot be allowed to seek a raft of orders before being made as a party. I have considered the applications, the submissions by counsel and the relevant judicial authorities and find that this is a matter that I will not exercise my discretion in favour of the Applicant hence the application is dismissed with costs to the Plaintiffs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 31<sup>ST</sup> DAY OF AUGUST, 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 Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

