



REPUBLIC OF KENYA



**Koi v Kingo & 2 others (Environment & Land Case 60 of 2017)
[2022] KEELC 3620 (KLR) (17 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 3620 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 60 OF 2017**

**MAO ODENY, J
AUGUST 17, 2022**

BETWEEN

CHARO THETHE KOI PLAINTIFF

AND

KAHELA JEFWA KINGO 1ST DEFENDANT

MUCHE KATANA MWINYI 2ND DEFENDANT

ABDALLA JAMAL 3RD DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 20th September 2021 by the Defendant/Applicants' seeking the following orders: -
 - a) Spent
 - b) That the execution of the Judgment issued by this Honourable Court on the 16th July, 2021 be stayed pending the hearing and determination of this application.
 - c) That during the hearing of this Application the interlocutory Judgment entered in this matter be set aside and the defendants be granted leave to defend this suit.
 - d) That the draft defence annexed be deemed to be duly filed upon payment of the filing fees.
 - e) That the costs of this application be provided for.
2. Counsel agreed to canvas the application *vide* written submissions which were duly filed.



Defendants' submissions

3. The application is based on the grounds on the face of the application together with the Supporting Affidavit of Abdalla Jamal, the 3rd Defendant who deponed that the Plaintiff filed the suit against him and his co defendants on 16th March, 2017 and later requested for Judgment on the basis of which an interlocutory Judgment was entered.
4. The 3rd Defendant stated that they were neither served with summons to enter appearance nor the notice of entry of interlocutory judgment. He further stated that the matter involved a parcel of land which he purchased in 2014 from the 1st and 2nd Defendants, the administrators of the estate of the late Cheva Kingo who was the initial allottee and legal owner of the suit property. He alleged that he had paid Kshs. 1, 250,000/- as a down payment leaving a balance of Kshs. 1,250,000/- which he later paid in installments and eventually got the property transferred into his name. He further deponed that he was ready to defend his interests in this matter since he has a good defence that raises triable issues.
5. Counsel submitted that the Plaintiff/ Respondent attached several affidavits as exhibits 1-3, that were supposed to be evidence of service but the same show that the process server never explained how he knew the Defendants place of residence, and or how he was able to serve each individual Defendants noting that they come from different areas.
6. Further that in the second affidavit the process server talks about going to the Defendants residence in Dera, while in reality the Defendants do not reside in the same household. That the 3rd Defendant for instance stays in Kanamai, while the 1st & 2nd Defendant stay in separate villages despite being co- wives.
7. Counsel relied on the case of *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another* [2018] eKLR and urged the court to allow the defendants to be heard on merit. Counsel also cited the case of *Mbogoh & Another vs Shah* 1968 EA which case laid down the principles of setting aside Judgment and urged the court to allow the application as prayed.

Plaintiff's Submissions

8. The Plaintiff filed a Replying Affidavit in opposition of the application and stated the 3rd Defendant was served with summons to enter appearance as stated by the Court process server in his affidavit filed in court with the application for interlocutory Judgment.
9. It was the Plaintiff's evidence that on 7th April, 2017 the 3rd Defendant was served with a court order and a Mention Notice. Further that on 4th May, 2017 and 2nd October, 2017 the 3rd Defendant was served with a Mention Notice and a Hearing Notice hence the allegation that he was never served is a falsehood.
10. The Plaintiff also deponed that by the time the 3rd Defendant was buying the suit property from the 1st and 2nd Defendant on 31st October, 2014 the same was not available for sale having been sold to him by the original owner on the 15th day of June, 1975.
11. Counsel submitted that the 3rd Defendant came to court without clean hands as he knew of the existence of the case and went ahead and caused a transfer to be registered in his favour before the determination of the suit. Further that the Defendant has no good chances of success if the Judgment is set aside as the Plaintiff/ Respondent has had uninterrupted use of the suit property since 1975 and relied on the case of *Wilson Njoroge Kamau v Nganga Mucheru Kamau* Muranga ELC No. 259 of 2017 (OS).



Analysis and Determination.

12. The issues for determination in an application for setting aside interlocutory judgments are as to whether there is a defence on the merit, whether there would be any prejudice to the Plaintiff and whether there is an explanation for any delay as was held in the case of *Mohamed & Anor v Shoka* [1990] KLR 463.
13. The court is further guided by the case of *Tree Shade Motors Ltd v DT Dobie & Another* [1995-1998] 1EA 324 where the court held that: -

‘Even if service of summons in valid, the judgement will be set aside if defence raises triable issue. Where a draft defence was tendered together with an application to set aside a default judgement, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff’s claim. Where the defendant showed a reasonable defence on the merits, the court could set the *ex-parte* judgement aside.’
14. From the affidavit of service on record, the process server stated that he visited the homes of the Defendants in Dera and Kanamai and was accompanied by one Ngala Mwangandi whom he did not explain who he was and how he knew the Defendants. I note that the said Ngala is not a party to this suit and it would have been prudent for the process server to introduce him and let the court know how he knows the Defendants. In all the affidavits of service he is mentioned but his identity is not clarified in respect of how he knows the Defendants including their place of residence.
15. Service of summons is very key as it is the way a party is notified that a case has been filed against him/her and that a response should be filed within a specified period of time. In the Tree shed Motors Case (*supra*) it states that even if service of summons in valid, the judgment will be set aside if defence raises triable issues. The question is whether the Defendants ‘draft defense has triable issues?’
16. The Defendant has claimed that he paid the full purchase price and has annexed a sale agreement 31st October 2014. The plaintiff also alleged that the 1st and 2nd defendants colluded and caused a transfer to be registered in the 3rd Defendant’s name which issue should be heard and determined to know the rightful owner of the suit land. If the court finds that the transaction was fraudulent after hearing all the parties, then it will make such determination. There will also no prejudice suffered if the interlocutory judgment is set aside.
17. Order 10 rule 11 of the *Civil Procedure Rules*, 2010 gives the court unfettered discretion to set aside interlocutory judgment after satisfying the principles as enunciated in *Pitbon Waweru Maina v Thuka Mugiria* [1983] eKLR; *Phillip Kiptoo Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende* [1982-88] KAR 1036.
18. Similarly, in the case of case of *Patel v East Africa Cargo Handling Services Ltd* [1974] E.A. 75 the court held that: -

“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"



19. The court cannot use its discretion to assist an indolent party, the discretion should be exercised judiciously.
20. I have considered the application, the affidavits filed, submissions by Counsel and the relevant law and authorities and find that this is a proper case for this court to exercise its discretion in favour of the Applicant. Accordingly, I hereby set aside the *ex parte* judgment delivered on 16th July 2021 and all the consequential orders and order that this suit proceeds *de novo*. The Defendants to file a defence within 30 days and pay thrown away costs of Kshs. 30,000/ before the hearing of this suit failure to which the order lapses.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH 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.

