



**Khamala v Kassim & another (Environment & Land Case 487 of 2014)  
[2022] KEELC 12819 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12819 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 487 OF 2014  
OA ANGOTE, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**CHARLES ALENGA KHAMALA ..... PLAINTIFF**

**AND**

**HOMESPLUS REALTORS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MOOSA ABDUL QADIR KASSIM ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. In the notice of motion dated April 7, 2022, the defendants/applicants have sought for the following orders:
  - a. That the *ex-parte* hearing on May 25, 2021 and resultant judgement on September 16, 2021 be set aside and the matter be heard on merit.
  - b. That the costs of this application be provided for.
2. The application is based on the grounds on the face of the motion and supported by the affidavit of the defendants' advocate, Jared K Bosire. In his affidavit, the defendants' advocate deponed that the plaintiff obtained judgement on September 16, 2021 after the hearing which proceeded *ex-parte* for non-attendance on the part of the defendants and that the hearing date of May 25, 2021 was taken *ex-parte* without inviting the defendants.
3. It was deponed on behalf of the defendants that when the matter came up for hearing on October 12, 2020, it was not listed on the cause list; that the defendants were surprised to be served with a notice of entry of judgement on March 14, 2022 and that the service was improper, defective and concealed.
4. According to the defendants' counsel, the prayers sought in the plaint are spent since the plaintiff moved out of the premises when he filed this suit; that the defendants will suffer great prejudice if



the judgement remains and is executed; that the defendants will be condemned unheard should this application be dismissed and that the defendants are now exposed to massive loss and damages should this court fail to intervene.

5. The application is uncontested as the plaintiffs did not file a reply. No submissions were filed by either the plaintiff or the defendants/ applicants.

### **Analysis and determination**

6. Upon considering the motion and the affidavit in support thereof, the issues that arise for determination are as follows:
  - a. Whether the defendant was duly served with a notice for hearing.
  - b. Whether this court should grant an order to set aside the hearing and judgement delivered in this matter.
7. In the notice of motion, the defendants' advocate has stated that the plaintiff obtained judgement on September 16, 2021 irregularly; that the hearing date of May 25, 2021 was taken *ex-parte* without inviting them and that they were not served with the notice for hearing, or alternatively, that such service was improper, defective or concealed.
8. This suit was commenced by way of a plaint dated April 22, 2014 wherein the plaintiff averred that he entered into a tenancy agreement with the 2<sup>nd</sup> defendant, who postured that he managed the suit property on behalf of the 1<sup>st</sup> defendant, the owner of the suit property, apartment no D2 of Moosa Qadir chambers, situate upon land parcel no Ir 209/1418/34 along chambers road (plot no 34) Ngara Nairobi.
9. According to the plaintiff, he paid a deposit of Kshs 88,000 which constituted Kshs 57,500 being two month's rent, a deposit of Kshs 2,500 towards electricity, Kshs 3000 towards agreement charges and the monthly rent of Kshs 27,500. The plaintiff averred that he then took possession of the suit property.
10. The plaintiff asserted that contrary to the representations made by the 2<sup>nd</sup> defendant, the 1<sup>st</sup> defendant landlord had not registered a power of attorney donating or delegating powers to the 2<sup>nd</sup> defendant to lease the unit and that the apartment had material defects.
11. The plaintiff averred that he alerted the defendants of the structural defects but they failed to repair such defects; that thereafter, he issued a one month's notice to terminate the tenancy contract and before expiry of the one month, the defendants threatened to evict him and to withhold his deposit of Kshs 57,500. The plaintiff consequently moved this court and sought several reliefs including refund of the Kshs 57,500/, special damages of Kshs 3000, general damages for deception, misrepresentation and/or harassment and aggravated or exemplary damages.
12. The defendants filed a defence dated July 22, 2019 in which they admitted that the 1<sup>st</sup> defendant is the owner of the suit property; that the 2<sup>nd</sup> defendant at all material times acted as the 1<sup>st</sup> defendant's agent or delegate and that before executing the agreement, the plaintiff physically inspected the suit premises and confirmed that the same was in good and habitable condition.
13. Order 12 Rule 7 of the [Civil Procedure Rules, 2010](#) gives this court discretion to set aside an *ex-parte* judgement as follows:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”



14. This court will be guided by the Court of Appeal of *East Africa in Shah v Mbogo & Another* [1967] EA 116, where it stated that a court is to exercise the discretion to set aside ex parte Judgment to avoid hardship resulting from an accident, or excusable mistake or error and not to aid a person who deliberately seeks to obstruct justice.
15. This court is also guided by the recent case of *Patriotic Guards Limited vs James Kipchirchir Sambu* [2018] eKLR, where the Court of Appeal stated the principles that are to guide a court in exercising its discretion:

“...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”
16. The principles for setting aside a default judgment were spelt out in the case of *Patel v East Africa Cargo Handling Services Ltd* [1974]EA 75 thus;

“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 judgement as is the case here the court will not usually set aside the judgement 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 SheridanJ. put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”
17. A similar finding was made by the Court of Appeal in *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR, where it stated that a court ought to consider whether a litigant raises an excusable mistake and whether their defence raises a triable issue:

“Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle...

The law is now well settled that in an application for setting aside ex parte judgment, the Court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues”
18. The Applicant in this matter has sought that this Court sets aside the judgement of the court delivered on September 16, 2021 on the grounds that it was not properly served with the hearing notice.
19. Where a party asserts that they were not duly served despite a process server swearing that they issued service, the Court of Appeal in *Shadrack Arap Baiywo v Bodi Bach* [1987] eKLR stated that there is a presumption of service in favour of a process server. The Appellate Court quoted with approval



Chitale and Annaji Rao's The Code of Civil Procedure Volume II page 1670, where the learned commentators state as follows:

“3. Presumption as to service – There is a presumption of services as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service.”

20. The appellate court in the above case found that the appellant had failed to discharge their burden of proof to disprove service. it stated:

“All that can be concluded is that the appellant had the burden of proof to disprove service, and on the strength of the return of service and affidavit of the process server, the burden of proof was not discharged by the appellant's mere denials. The affidavit of the process server appears much the stronger evidence.”

21. The applicants/ defendants have asserted that they were not served notice of the hearing date of May 25, 2021. It is undisputed that this suit was scheduled for hearing on October 12, 2020, which date was set by the court and with the knowledge of both the parties to this suit. However, the court record indicates that only the plaintiff's Advocate, Mr Shaban, was present in court on October 12, 2020. On that date, the court fixed the matter for hearing for May 25, 2021.

22. Evidence of the service of the hearing notice was tendered by Mr Samson Eboso, a process server for the Respondents. Mr Eboso swore an Affidavit of Service where he deponed that he served the hearing notice on a Mr Kerongo, in the office of Kerongo, Bosire & Co Advocates, the Applicants' Advocates on May 17, 2021. Mr Eboso attached the said hearing notice which bears the stamp of Kerongo Bosire & Company Advocates and is signed as received on May 17, 2021.

23. The stamped hearing notice and the Affidavit of service sworn by Mr Eboso raises a presumption of service of the hearing notice. The burden of proof was thus upon the Defendants who questioned this return, to show that it was incorrect. While Counsel for the Defendants has denied that such service was effected, he failed to tender any evidence to upend this presumption of service. The Defendants' advocate therefore failed to discharge his burden of proof. On this basis, this court should be guided by the evidence of the process server that the Defendants' counsel was indeed served with a hearing notice.

24. In determining, whether the Defendants' defence raises a triable issue, this Court is guided by the aforementioned decisions of *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR and *Patel v East Africa Cargo Handling Services Ltd* [1974] EA 75. It is undisputed that the plaintiff moved out of the suit premises about the time that he filed this suit.

25. Consequently, several prayers he had made in his Complaint were overtaken by events. What remained for the court to consider were the prayers for refund of the deposit of Kshs 57,500, special damages of Kshs 3,000/., general damages for deception, misrepresentation and harassment, aggravated or exemplary damages and costs of the suit.

26. In their filed defence, the Defendants conceded that indeed the plaintiff deposited the sum of Kshs 88,000 with them, which included a deposit of Kshs 57,000/.. The Defendants have indicated in their defence that if there were any defects of the suit premises, which they deny there were any, such defects



were caused by the plaintiff or his agents. The Defendants however have failed to present any evidence to show the basis upon which they can hold on to the plaintiff's deposit. On this basis, the court finds that the defence does not raise any triable issue.

27. For these reasons, the application dated April 7, 2022 is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH DAY OF SEPTEMBER, 2022**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

**No appearance for the plaintiff**

**No appearance for Defendants**

**Court Assistant - June**

