



Ochilo v Theuri & another; Morang'a (Objector) (Environment & Land Case 141 of 2012) [2022] KEELC 12749 (KLR) (30 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12749 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 141 OF 2012
A OMBWAYO, J
SEPTEMBER 30, 2022**

BETWEEN

JESSE OYUGI OCHILO PLAINTIFF

AND

JOSEPH MAINA THEURI 1ST DEFENDANT

DOROTHY AWENDE MASUI (DECEASED) 2ND DEFENDANT

AND

MACHIBONI ELLIASSY MORRIS MORANG'A OBJECTOR

RULING

1. The matter for determination is the 1st Defendant's Application dated November 29, 2021 filed under sections 1A,1B and 3A of the *Civil Procedure Act* and Order 5 Rule 16, Order 10 Rule 11, Order 22 Rule 22 (1), Order 48 Rule 2 and Order 51 Rule 1 of the *Civil Procedure Rules*, Articles 50 and 159 of the *Constitution* of Kenya, 2010 seeking for orders that this Honourable Court be pleased to set aside the Judgment delivered on the November 8, 2017 by the learned Judge Hon AK Kaniaru together with all other consequential orders arising therefrom in their totality and this Honourable Court be pleased to direct and order that the 1st Defendant/Applicant be granted leave to defend this matter and that the case be set down for hearing on merit. That the Plaintiff/Respondent herein do bear costs of this Application.
2. The Application was based on grounds that the 1st Defendant/ Applicant married the 2nd Defendant (Deceased) and lawfully lived as husband and wife until her untimely demise on June 25, 2014. That the 1st and 2nd Defendant lawfully acquired the land parcels Kisumu/konya/3643 and Kisumu/konya/5544.



3. It is the 1st Defendant's case that vide sale agreements dated April 26, 2008, the 1st Defendant and the 2nd Defendant agreed to sell to the Plaintiff all that parcel of land known as Kisumu/konya/3643 and Kisumu/konya/5544 at a consideration of Kshs 255,000/= each. That the Plaintiff reneged on the terms of the said agreement by failing to pay the purchase price as agreed leaving the 1st Defendant and the 2nd Defendant with no choice than to look for a new purchaser.
4. It is averred that in May 2009, the 1st Defendant and the 2nd Defendant found the Objector herein and agreed to sell to him the suit properties at a consideration of Kshs 750,000/= which amount the objector paid in full and final settlement and the suit properties were transferred to the Objector. That in November 2021 the Objector notified the 1st Defendant that the Plaintiff is interfering with his quiet and peaceful occupation of the suit properties and has filed an Application dated March 12, 2019 seeking an order for attachment and sale of land parcels Kisumu/konya/3643 and Kisumu/konya/5544 to settle the decretal sum alleged to have been awarded to the Plaintiff/Respondent in Kisumu Elc No 141 Of 2012; Jesse Oyugi Ochilo Vs Joseph Maina Theuri & Another.
5. It was stated that upon inquiry, the 1st Defendant/Applicant discovered that the Plaintiff without the involvement and/or participation of the Defendants and in utter violation of his right under Article 50 of the Constitution and the rules of natural justice, approached this court in Kisumu ELC No 141 Of 2012; Jesse Oyugi Ochilo Vs Joseph Maina Theuri & Another for Judgment against the Defendants. That there was no proper service upon the Defendants and the Plaintiff illegally and/or irregularly obtained Judgment from this court on November 8, 2017 thus condemning them unheard contrary to the express provisions of Article 50 (1) of the Constitution of Kenya and the rules of natural justice.
6. It was further averred that the 2nd Defendant died on June 25, 2014, a fact that was well within the knowledge of the Plaintiff and during the hearing and determination of this suit, no proper service could be effected upon a deceased person. It was stated that it is in the interest of justice that the Judgment delivered on November 8, 2017 and the decree issued together with all other consequential orders arising therefrom be set aside in their totality, the Defendants be granted leave to defend this matter and that the case be set down for hearing on merit.
7. It was further stated that the 1st Defendant has a strong Defence which raises weighty and triable issues that can only be dispensed with upon consideration on merit and that the Plaintiff will not suffer any form of prejudice if the orders sought are granted and on the contrary, the 1st Defendant and the 2nd Defendant's estate stand to suffer irreparable loss should this court decline to grant the orders sought. The Application was supported by the Affidavit of Joseph Maina Theuri.
8. The Plaintiff herein filed a response to the Application vide a Replying Affidavit where Jesse Oyugi Ochilo deposed and stated that he entered into an Agreement for Sale on April 26, 2008 with the 1st Defendant for sale of land parcel number Kisumu/konya/3643 at a consideration of Kshs 255,000/= and on the same day the 2nd Defendant agreed to sell to him her parcel of land known as Kisumu/konya/5544 at Kshs 255,000/= vide an agreement for sale dated April 26, 2008.
9. It is the Plaintiff's case that upon execution of the sale agreements, he paid total of Kshs 300,000 as per the terms and conditions being Kshs 150,000/= for each parcel of land and the balance was to be paid upon transfer. That the Defendants were to inform him upon consent of the Land Control Board being granted to enable him remit payments of the balance.
10. It is stated that the Defendants did not get back to him as agreed and efforts to reach them proved futile prompting him to register a caution on October 9, 2008 to safeguard his interests. That he decided to carry out a search and to his dismay and utter shock, he discovered that the consent of the Land Control Board had been granted to the Defendants without his knowledge. He stated that the decision



- of the Defendants to withhold that information from him was actuated with malice and bad faith as the Defendants planned to sell the suit parcels to a third party irrespective of the fact that he had made payments for the same.
11. The Plaintiff averred that at the time of registering the caution, he had drawn two cheques each of Kshs 105,000/= in the names of the Defendants being payment of the balance in compliance with the agreement. That he informed the Defendants to collect the cheques but they mischievously failed to do so and on July 7, 2009, Mr John Ogam and David Omondi Ochillo being his agents informed him that someone had gained entry into the suit parcels.
 12. He stated that despite obtaining the Land Control Board consent to transfer the parcels of land to him, the Defendants committed fraud by selling the land to somebody else one Machibon Morris, the Objector herein without the Plaintiff's consent or permission. That upon carrying out a search by his agents, it was discovered that the suit parcels of land were registered in the name of the Objector herein.
 13. It is the Plaintiff's case that sometimes in August 2009, he lodged a complaint with the Land Registrar and the Objector was summoned. He stated that the Land Registrar informed him that the transaction was fraudulent to which he addressed a letter to the Objector informing him that he noted that he defied his earlier advice regarding the suspension of the development and summoned the objector to appear before him for further clarification. The Objector ignored the summons and the Land Registrar informed him that if he continued to ignore the summons, he would cancel the title deeds without further reference to him.
 14. That the title deeds were cancelled and the suit properties reverted to the Defendants respectively and the caution that had been lifted by the Land Registrar was reinstated. The Plaintiff further stated that after the institution this suit, the court issued summons on December 19, 2012 to the Defendants to enter appearance and the Defendants were served with the summons together with all the relevant documents.
 15. It is also the Plaintiff's case that the Defendants have always been aware of the proceedings but failed to appear in a bid to beat justice and therefore the court heard and determined the suit in his favour where the court ordered that the Defendants do refund the Plaintiff all the monies paid to them. He stated that he should be allowed to enforce the decree and should not be denied an opportunity to enjoy the fruits of his Judgment.
 16. The Application was canvassed by way of written submissions as directed by the court.

1st Defendant's Submissions

17. The 1st Defendant filed his submissions on May 4, 2022 and the main issue raised for determination was whether the Judgment delivered on November 8, 2017 with all other consequential orders arising therefrom should be set aside in their totality.
18. It was submitted that the Plaintiff despite proper service of this Application, failed to file his response to the Application and therefore the Application is uncontested and should be allowed. Reliance was placed in the case of *Iseme Kamau Maema & Co Advocates vs Conord Insurance Co Ltd (2020) e KLR*. The 1st Defendant also relied on Order 10 Rule 11 of the Civil Procedure Rules which states that where Judgment has been entered under this Order the court may set aside or vary such Judgment and any consequential decree or order upon such terms as are just.
19. It was the 1st Defendant's submissions that the power of the court to set aside Judgment is discretionary as was held in the case of *Patriotic Guards Ltd vs James Kipchirchir Sambu, Nairobi CA No 20 of 2016, (2018) eKLR*. The 1st Defendant relied on the provisions of Article 50 (1) of the [Constitution](#) of Kenya,



- 2010 on the right to be heard and the case of *Absolom Opini Mikenye vs James Obegi (2018)* where it was stated that 'the right to be heard is a valuable right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.'
20. It is the 1st Defendant's submission that the Judgment was irregularly obtained since he was not served with any pleadings and/or summons to enter appearance and at the time of the said proceedings, the 2nd Defendant had already passed on in the year 2014, fact which the Plaintiff had failed to controvert.
21. The 1st Defendant relied in the case of *James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another (2016) eKLR* where the court emphasized on the importance of the right to be heard. It was submitted that the impugned Judgment was irregularly obtained in utter violation of Article 50 (1) of the *Constitution* of Kenya.
22. On the issue of whether the 1st Defendant should be granted leave to defend this matter and the case do proceed for hearing on merit, it was submitted that the 1st Defendant having demonstrated to the satisfaction of this court that the Plaintiff irregularly obtained the Judgment, it is just and fair that he be allowed to defend the suit herein. He relied in the case of *Moses Ogutu Odongo vs Johnstone Otieno Londe & 3 Others (2022) eKLR*.
23. On whether the process server of the Affidavit of Service sworn on December 18, 2013 should be called for cross-examination, the 1st Defendant relied on the provisions of Order 5 Rule 16 of the Civil Procedure Rules and stated that the said prayed is unopposed and it is in the interest of justice that the process server of the Affidavit of Service be summoned for cross- examination.
- On the issue of costs, the 1st Defendant stated that costs follow events and prayed to be awarded costs.

Plaintiff's Submissions

24. The Plaintiff filed his submissions on June 8, 2022 where he raised a number of issues for determination as discussed below.
- On whether the Judgment delivered on November 8, 2017 together with all the consequential orders should be set aside in their totality; the Plaintiff relied on Order 10 Rule 11 of the Civil Procedure Rules where the court has unfettered discretion to set aside Judgment entered in default as was also held in the case of *Esther Wamaita Njibia & 2 Others vs Safaricom Ltd* and *Shah vs Mbogo*.
25. It was stated that the Defendant was duly served with the Plaint and Summons to enter appearance and they accepted service together with various Mention and Hearing Notices.
- On whether the 1st Defendant should be granted leave to defend this matter and the case do proceed for hearing on merit; the Plaintiff submitted in the negative and relied in the case of *Continental Butchery Limited vs Nthiwa (1978) KLR* and stated that it would be unfair to allow the 1st Defendant to defend the suit as he had been given an opportunity to do so but failed and or neglected to do so. That the Defendants have failed to demonstrate that they have a strong Defence with triable issues.
26. On the issue of whether the process server of the Affidavit sworn on November 18, 2013 should be called for cross examination; it was submitted that the process server effected service upon the 1st Defendant and to the 2nd Defendant before her demise as required by the law and therefore the 1st Defendant's prayer is meant to delay justice.
- On costs, it was submitted that the Application lacks merit and therefore costs should be awarded to the Plaintiff.



Analysis and Determination

27. This court has considered the pleadings, evidence and submissions filed by the parties and is of the view that the following issues need to be determined:
- a. Whether the Judgment delivered on November 8, 2017 together with all other consequential orders arising therefrom should be set aside in their totality.
28. It is the 1st Defendant's case that there was no proper service upon the Defendants and the Plaintiff illegally and or irregularly obtained Judgment from this court thus condemning them unheard and that the 2nd Defendant died on June 25, 2014, a fact that was well within the knowledge of the Plaintiff as service could not be effected upon a deceased person. On the other hand, the Plaintiff has stated that after institution of this suit against the Defendants, the court issued summons on December 19, 2012 and the said summons together with the Plaintiff, Verifying Affidavit, Witness Statements, List of Witnesses, List of Documents and Annexures were given to the process server to effect service upon the Defendants which he did.
29. It is clear that the Defendants failed to file their Defence and the court heard the prosecution and determined this suit in favour of the Plaintiff. In as much as the 1st Defendant in his Supporting Affidavit stated that he has a strong Defence which raises weighty and triable issues, he failed to attach the said draft Defence for this court to consider.
30. In the case of *James Kanyiiita Nderitu & Another [2016] eKLR*, the Court of Appeal stated as follows:
- ' From the outset, it cannot be gainsaid that a distinction has always existed between a default Judgment that is regularly entered and one which is irregularly entered. In a regular default Judgment, the Defendant will have been duly served with summons to enter appearance or to file 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 a scenario, the court has unfettered discretion in determining whether or not to set aside default Judgment, and will take into account such factors as the reason for failure of the Defendant to file his Memorandum of Appearance or defence, as the case may be; the length of time that has elapsed since the default Judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default Judgment, among others.'
31. In *Richard Murigu Wamai vs Attorney General & another [2018] eKLR*, court observed that:
- ' That where there 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 the merits does not mean a defence that must succeed. It means a 'triable issue' that is an issue which raises a prima facie defence which should go to trial for adjudication.'
32. In the case of *Job Kiloch vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio [2015] eKLR*, the court stated as follows:
- ' What then is a defence that raises no bona fide triable issue. A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term 'triable' as, subject or liable to



judicial examination and trial'. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.'

33. This court has discretion to determine whether or not to set aside Judgment. Based on the above case law, I am of the view that the Plaintiff herein filed this suit against the Defendants and did not enjoin the Objector herein. Since the Objector herein had purchased the suit properties from the Defendants this court is of the view that the Judgment delivered on November 8, 2017 and all consequential orders be set aside in order to enable all the parties to be heard. I am also of the view that since the 2nd Defendant died and hearing of this suit commenced when she had passed on, the 1st Defendant should be given an opportunity to be heard in order clear the issues before this court on whether they sold the suit properties to the Plaintiff and the Objector herein.

34. On the issue of whether the process server of the Affidavit sworn on 18th December should be called for cross examination; Quite illuminating eminent work by Chitaley and Annaji Rao; *The Code of Civil Procedure Volume II page 1670* that:

There is a presumption of service 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.

35. Service of Summons is provided for in Order 5 Rules 6 and 7 of the Civil Procedure Rules are explicit that service of summons shall be made by delivering or tendering the duplicate thereof; and Rule 8(1) in particular envisages that:

' Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.'

36. I have looked at the Affidavit of service of Alexander Ochwo Alela sworn on December 18, 2013 which indicates that service was effected upon the Defendants herein who accepted service but declined to sign the principal copy and not satisfied with the said service.

In the upshot, this court allows the Application dated November 29, 2021 and do order as follows:

1. That Judgment delivered on the November 8, 2017 by the learned Judge Hon AK Kaniaru together with all other consequential orders arising therefrom in their totality is hereby set aside.
2. That the 1st Defendant/Applicant is granted leave to file a Defence within 14 days and the matter be heard on merit.
3. That the costs of this Application be in the cause.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30th DAY OF SEPTEMBER, 2022

ANTONY OMBWAYO

JUDGE

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

