



REPUBLIC OF KENYA



KENYA LAW
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**Odhiambo & another v Chimwene (Environmental and Land Originating Summons
240 of 2014) [2022] KEELC 12737 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12737 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 240 OF 2014
A OMBWAYO, J
SEPTEMBER 30, 2022**

BETWEEN

LUCY AUMA ODHIAMBO 1ST PLAINTIFF

PAMELA UDO MBECHE 2ND PLAINTIFF

AND

MARTHA CHIMWENE DEFENDANT

RULING

Brief Facts

1. Martha Chimwene, the Defendant herein filed a Notice of Motion Application dated 30th May 2022 pursuant to section 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 9 Rule 9 & 10, Order 12 Rule 7 and Order 37 Rule 18 of the *Civil Procedure Rules* 2010 seeking the following orders:
 1. That this Application be certified urgent and be heard ex parte in the first instance.
 2. That leave be granted the firm of Ouma Njoga & Co Advocates to come on record in this matter for the Respondent/Applicant-Martha Chimwene in place of the firm of K'owinoh & Co. Advocates presently on record.
 3. That upon grant of prayer 2 above, this Honourable Court be pleased to issue interim order of stay of further proceeding herein and/or stay of execution of the decree herein pending the hearing and determination of this Application.
 4. That this Honourable Court be pleased to set aside the ex parte proceedings of 26.10.2021 and the consequential Judgment and/or decree herein on such terms as are just and order that trial herein commences de novo.



5. That all proceedings and/or Affidavits hitherto filed herein in the name of the Respondent/Applicant herein by the firm of K'owinoh & Co Advocates or any other firm of advocates be struck out and expunged from the court record for having been filed without instructions and are a forgery in some instances.
6. That the costs of this Application be provided for.
2. The Application was based on grounds that until a few days post the delivery of the Judgment in this suit, the Defendant/Applicant herein had not been aware about the existence of this suit as she to date has not been served with any Originating Pleadings, Summons or any documents or otherwise in this suit. It is averred that although the court records capture the firm of K'owinoh & Co Advocates as being on record for the Defendant/Applicant, retainer is challenged as the Defendant apart from asserting that she did not and has never retained the services of the firm of K'owinoh & Co Advocates to act for her, disowns the Replying Affidavit filed on 7th October 2014 purportedly sworn by the Defendant/Applicant on 6th October 2014 as the handwork of forgery.
3. It is alleged that having not been served, the Defendant has not been privy to the existence of this suit as a result has not participated in this suit and was not aware of the hearing that proceeded ex parte on 26th October 2021. That the Plaintiffs are strangers to the Defendant/Applicant as the latter has never had any dealings with them whatsoever leave alone entering into a transaction with them in respect of the suit property and has in fact reported to Central Police Station Kisumu the matter vide OB No. 57/26/5.22.
4. It is the Defendant's case that being a stranger to the sale agreement dated 21st March 2013, and having no dealings whatsoever with the Plaintiffs or the firm of M.A. Ochanji Opondo & Co. Advocates in respect of the impugned sale agreement and having not received any monies in respect thereto the Defendant has a formidable Defence which she craves leave of this court to ventilate. That having not instructed the firm of K'owinoh & Co Advocates as by law required the said firm of advocates do not qualify to be her duly recognized agents or appointed advocates for the purposes of these proceedings.
5. It was stated that the Defendant/Applicant stands being condemned unheard through the conspiracy of third parties without her consent or knowledge and now stands to lose a prime property and a huge sum of money unless the orders sought are granted and as requirement of law leave of court is required for a change of Advocate is to be effected post Judgment where another Advocate is on record as at the time of the delivery of the same.
6. The Application was supported by the Affidavit of the Defendant who stated that until 17th May 2022 upon a routine visit to the offices of Ouma Njoga & Co Advocates who are her Advocates, she was not aware about the existence of this suit and on the day she visited her Advocates office on another matter that the firm is handling on her behalf, she was shocked when her Advocate inquired from her about her Judgment that was scheduled for delivery on 13th May 2022.
7. She stated that she learnt that a notice had been posted on the official WhatsApp wall for the Kisumu Court by the Deputy Registrar Environment and Land Court on 5th May 2022 advising members of the group that certain Judgment would be delivered online on 13th May 2022 and this matter topped the list which information consternated her since she was not aware about any land case that was against her which was pending Judgment. That the said Advocate then proceeded to show her the said notice and she learnt that two strangers, the Plaintiffs herein had sued her in 2014 and the matter had been proceeding in court and she was supposed to be represented by the firm of K'owinoh & Co Advocates.



9. It was the Defendant's case that she had not made any dealings with the Plaintiffs as they are strangers to her and up to now, she had not been served with any pleadings, summons or any other documents in this suit by the Plaintiffs or their representatives and in addition he has never had any dealings or instructed the firm of K'owinoh & Co Advocates to act for her in this matter or any other or at all. That she sought the advise of her Advocate Robert Ouma Njoga on the way forward upon which he advised her to proceed to the offices of the firm of K'owinoh & Co Advocates for more information or try and access the court file and establish the exact position of this matter. That she managed to obtain a copy of the Judgment that was delivered on 13th May 2022 and upon perusing the Judgment, she learnt that substratum of the suit against her was a sale agreement dated 21st May 2022 that she was supposed to have entered into with the Plaintiff with respect to the property she is holding in trust for her son Kevin Minanga Ochieng known as LR NO. 15983/66 and pursuant to which a sum of Kshs. 2,000,000/= was supposed to have been deposited with M.A. Ochanji-Opondo & Co. Advocates on her behalf.
10. That my Advocate proposed that we call the Advocate on record for the Plaintiffs and she managed to have a discussion with the Advocate and was advised by both Advocates to report the matter to the police and her Advocate also advised her to go to court and seek orders setting aside the proceedings and the Judgment. That upon perusal of the court file, it was established that the suit was commenced by way of Originating Summons dated 18th August 2014 and was drawn by M.A. Ochanji -opondo & Co Advocates, That there is an Affidavit of service in the court file dated 26th August 2014 sworn by one Nickson Akech Advocate showing that the office of M.A. Ochanji-opondo & Co. Advocates were on 20th August 2014 served with the court documents allegedly as her Advocates and that the firm of K'owinoh & Co Advocates entered appearance on her behalf and filed a Replying Affidavit on her name.
11. It is averred that the Advocate showed her a copy of the Sale Agreement dated 21st May 2013 drawn by the office of M.A. Ochanji-opondo & Co Advocates purportedly as her Advocate and upon perusal of the Sale Agreement and the Replying Affidavit, the Defendant established that the signatures therein had been forged. It was also established that the hearing proceeded ex parte.
12. It is the Defendant's case that if it is true that the firm of M.A Ochanji-Opondo & Co Advocates drew the impugned Sale Agreement at the heart of this suit then in law she was expressly precluded from acting for the either party to the transaction in any resultant proceeding whereof service of the Originating Summons and any pleadings and/or documents on her behalf in the circumstance constituted improper service in law and this court has discretion to grant the orders sought.
13. The matter was placed before Honourable Justice Anne Koross who ordered that the Application is not certified urgent, the Applicant to serve the Application together with filed written submissions within 14 days , the Respondent to file Responses and Submissions within 14 days, the Applicant shall be at liberty to put in Supplementary Affidavit and Submissions within 7 days of service by the Respondent and the matter shall be mentioned for directions or to take a Ruling date before the ELC Judge Kisumu on 18th July 2022.
14. On 30th May 2022, the Defendant's Advocates wrote a letter to this court with an recording a consent that leave be granted that the firm of Ouma Njoga & Co Advocates to come on record on behalf of the Defendant in place of K'owinoh & Co. Advocates. I have perused the file and do confirm that Parties herein failed to file their written submissions.



Analysis and Determination

15. I have considered the Defendant's Application and I am of the view that the Defendant is a stranger to the pleadings in the instance suit as she has never instructed the firm of K'owinoh & Co Advocates to act on her behalf with respect to Land Reference Number 15983/66 as alleged. The Defendant has sought for orders that this court sets aside the ex parte proceedings of 26th October 2021 and the consequential Judgment and/or decree therein on terms as are just and order that trial commences de novo.
16. Order 12 Rule 7 of the Civil Procedure Rules provides as follows:

“Where under this order judgment has been entered or a suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”
17. The court is required to exercise discretion when setting aside a Judgment as was held in the of *Shah vs Mbogo* (1979) EA 116 quoted with approval in the case of *John Mukuba Mburu v Charles Mwenga Mburu* [2019] eKLR, where that court held thus:

“.....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”
18. I have read the Supporting Affidavit of the Defendant and I am convinced that there is a possibility that she has never sold the suit property and that her son never entered into an Agreement for Sale with the Plaintiffs to sell the suit property. That the signature on the Replying Affidavit in response to the Originating Summons is likely not hers. The Defendant was also not served with the pleadings of this suit and is therefore a stranger to the said proceedings and was not aware of the existence of the suit as clearly stated in her Supporting Affidavit.
19. This court therefore allows the Application and orders as follows:
 1. That the ex parte proceedings of 26th October 2021 and the consequential Judgment and/or decree are hereby set aside and trial to commence de novo.
 2. That all pleadings and/or affidavits hitherto filed in the name of the Defendant herein by the firm of K'owinoh & Co Advocates or any other firm of Advocates be struck out and be expunged from the court record for having been filed without instructions and are a forgery.
 3. That the costs of this Application be borne by the Plaintiffs.

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

