



**Kahawa West Jubilee Investment Ltd v Gitau & another (Environment & Land
Case 44 of 2016) [2022] KEELC 4859 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4859 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 44 OF 2016
CA OCHIENG, J
SEPTEMBER 22, 2022**

BETWEEN

KAHAWA WEST JUBILEE INVESTMENT LTD PLAINTIFF

AND

JAMES GITAU 1ST DEFENDANT

JOHN KAINGA 2ND DEFENDANT

RULING

1. What is before Court for determination is the Defendants' Notice of Motion application dated the November 11, 2021 brought pursuant to Section 63(e) and 80 of the [Civil Procedure Act](#) as well as Order 45 Rule 1 of the [Civil Procedure Rules](#). The Defendants seek the following orders:
 1. Spent
 2. That this Honourable Court be pleased to grant leave for the firm of M/S Kamuiru Muibu & Co. Advocates to come on record after judgment for the Applicants/Defendants herein.
 3. That in the interim, this Honourable Court be pleased to issue stay of the Judgment dated October 18, 2019 and the resultant Decree dated December 19, 2019 pending the hearing and determination of this application.
 4. That the Court process server Benson S Mulumba be cross examined during the hearing of the application.
 5. That upon hearing and determination of this application, the Judgment dated October 18, 2019 and the resultant Decree dated December 19, 2019 be set aside and or be reviewed.
 6. That this Honourable Court be pleased to grant leave to the Applicants/Defendants to file and serve their Statement of Defence.



7. That the costs of this application be provided for.
2. The Application is premised on the grounds on the face of it and the supporting affidavit of James Gitau and John Kahiga where they claim their mother Jane Njoki Kiarie settled her family on the suit property (*Ndalani/Mavoloni Block 1/ 1009*) in 1983. Further, that they have resided thereon from 1983 upto 2021 when they were forcefully evicted. They contend that their mother purchased the suit property on 16th March, 1983 from one Moses Mutune Kithome and paid valuable consideration. They explain that part of the consideration of the suit property was their mother's land in Nzuki-ini which the said vendor excised five (5) acres and proceeded to sell. Further, they have sought assistance from various offices to compel Moses Mutune Kithome to register the suit property in their mother's but it was in vain. They confirm that at the point of sale, the suit property was unregistered but in the form of a share at Mavoloni Company Limited and when the same was finally registered, the said vendor Moses Mutune Kithome in collusion with the said company in which he was a director fraudulently caused the transfer of the said property to himself and thereafter resold it. They insist they were only served with a demand letter dated the April 26, 2016 which they responded to. They deny knowledge of the instant suit until they were forcefully evicted from their land and their belongings destroyed. They contend that the affidavit of service by Benson S Mulumba confirms there was no proper service upon them. They reiterate that there are not trespassers and or squatters as claimed but have legitimate claim to the suit property. Further, that Judgment was entered through concealment of material facts. They insist they have a plausible defence that is meritorious and has a high likelihood of success.
3. In opposition to the instant application the Plaintiff filed a replying affidavit sworn by Nancy Nyaguthii Macharia its director where she deposes that the said application is scandalous, frivolous, vexatious and is an abuse of the court process. She insists that the Defendants averments are baseless, misleading and made to vex the Plaintiff. She contends that the application seeks to obstruct the cause of justice and if allowed, the same would be repugnant to good practice and timely administration of justice. She insists that the impugned Judgment was a regular one as the Defendants were duly served with all the court attendance notices but they ignored and or failed to file their Defence including accompanying documents. Further, that the Defendants grounds to have one Benson S Mulumba to be cross examined during the hearing of the application dated November 17, 2021 are baseless as they were also served with relevant documents by Ezekiel Masai. She avers that the annexed affidavit of service clearly indicates that one of the Defendant's was personally served and was fully aware of this case. She reiterates that the Defendants are not being candid as they never even attempted to hire an advocate and states that this application is an afterthought as it only arose when the Defendants were served with a Decree as well as an eviction notice. Further, that the Plaintiff should be allowed to enjoy the fruits of its Judgment as it proved to court how it became the registered proprietor of the suit property. She contends that no valid grounds seeking stay have been advanced and the orders sought have been overtaken by events.
4. The Defendants filed a further affidavit where they reiterated their averments and insist they have a formidable and definable stake in the suit property and they are highly prejudiced if they are isolated from it. Further, that the Defence raises triable issues and no inordinate delay has been made in bringing this Application. They argue that the supposed purchase of the suit property by the Respondent was encumbered as they were in the said property.
5. The application was canvassed by way of written submissions.



Analysis and Determination

6. Upon consideration of the Defendants' Notice of Motion dated the November 11, 2021 including the parties' affidavits and rivaling submissions, the following are the issues for determination: Whether the firm of M/S Kamuiru Muibu & Co. Advocates should come on record after Judgment for the Defendants herein. Whether the Court process server Benson S Mulumba should be cross-examined during the hearing of the Application. Whether the Judgment dated the October 18, 2019 and the resultant Decree dated December 19, 2019 should be reviewed and or set aside. Whether the Defendants should be granted leave to file and serve their Statement of Defence.
7. The Defendants in their submissions reiterated their averments in the two affidavits and claim they were denied their rights to a fair trial since the Judgment entered and resultant Decree therefrom, was based on one sided averments and they continue to be prejudiced. They insist they were not properly served with summons to enter appearance or any other pleadings. They reiterate that their Defence raises triable issues. To support their averments, they relied on the following decision: *Esther Wamaita Njibia & 2 others Vs Safaricom Ltd.*
8. The Plaintiff in its submissions insists the Judgment or other consequential orders should not be set aside. Further, that the instant application is vexatious, frivolous and an abuse of the court process. It insists, it will suffer prejudice if the orders sought are granted. It reiterates that the Defence does not raise triable issues and there is no explanation in the Defendants' failure to file the Defence. Further, that the court can impose terms for setting aside of the impugned Judgment. To support its argument, it relied on the following decisions: *James Kanyita Nderitu v Maries Philotas Ghika* (2016) eKLR; *Abdalla Mohammed & Another v Mbaraka Shoka* (1990) eKLR; *Machira t/a Machira & Co. Advocates v East African Standard (No.2)* (2002) KLR 63 and *Cooperative Bank Limited Vs Banking Insurance & Finance Union Kenya.*
9. As to whether the firm of M/S Kamuiru Muibu & Co. Advocates should come on record after Judgment for the Defendants herein.
10. I note the aforementioned firm seeks to come on record for the Defendants after the entry of Judgment and issuance of a Decree. I further note that the Defendants did not defend this suit prior to the delivery of the impugned Judgment. Be that as it may, I note Order 9 Rule 9 of the *Civil Procedure Rules* only makes the following provisions:
 - a. upon an application with notice to all the parties; or
 - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."
11. Since the Defendants had never entered appearance nor defended this suit before entry of Judgment, while relying on the provisions of Order 9 of the *Civil Procedure Rules*, I will proceed and allow the aforementioned law firm to come on record for them.
12. As to whether the Court process server Benson S Mulumba should be cross-examined during the hearing of the application.



13. I note the Defendants have sought to cross-examine the aforementioned process server. I have perused the affidavit of service filed in court on July 26, 2016 wherein the said process server indeed explains having served the 2nd Defendant's wife and personally served the 1st Defendant on June 15, 2016 in the presence of the 2nd Defendant's wife. From the court records, the Defendants were further served three times by a different process server called Ezekiel Masai as evident from the affidavits of service filed in court. In the case of *Shadrack Arap Baiywo V Bodi Bach* (1987) eKLR the Court of Appeal while dealing with an issue of service held thus:

“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.”

14. It is my considered view that there was proper service upon the Defendants who have failed to advance plausible reasons why the said process server should be cross-examined since they have not denied residing at Ndalani and while relying on the decision cited, I will hence decline to grant the order as sought.

15. As to whether the Judgment dated the October 18, 2019 and the resultant Decree dated December 19, 2019 should reviewed or set aside and the Defendants granted leave to file as well as serve their Defence.

16. I note the Judgment sought to be set aside or reviewed was delivered on October 18, 2019 while the instant Application was filed on November 11, 2021 which was two years after its delivery. The Defendants contend that they were not served with summons to enter appearance. Further, that they have resided on suit property from 1983 until their eviction in 2021. They claim their mother entered into a Sale Agreement with a vendor called Moses Mutune Kithome in 1983 in respect to the suit property but does not explain why their mother had not processed a transfer in her name. They claim their mother paid the full consideration but on perusal of the annexed Sale Agreement, it does not indicate the title to the suit land. I note the Plaintiff is the registered proprietor of the suit property as evident in the Certificate of Title which was produced in court. In their draft Defence, they have not demonstrated how the said title was acquired fraudulently. It has emerged that the Defendants have already been evicted from the suit property in enforcement of the Judgment and the consequential Decree. Order 10 Rule 11 of the *Civil Procedure Rules* stipulates 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.”

17. In the case of *Patel v E.A. Cargo Handling Services Ltd* [1974] EA75 at page 76C and E the court held as follows:-

“There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte Judgment except that if he 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 it by the rules.”

18. Based on my analysis above while relying on the quoted legal provisions and in associating myself with the cited decisions, I find that there is no evidence of triable issues raised to warrant the setting aside or review of the Judgment. Further, I note that the Plaintiff had already executed the Decree herein and there was inordinate delay by the Defendants in filing the instant Application which has been overtaken by events.



19. In the circumstance, I find the Notice of Motion Application dated November 11, 2021 unmerited and will proceed to dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 22ND DAY OF SEPTEMBER, 2022

CHRISTINE OCHIENG

JUDGE

