



REPUBLIC OF KENYA



**KENYA LAW**  
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**Obara v Tuong'o (Environment and Land Appeal E014 of 2021)  
[2022] KEELC 13375 (KLR) (19 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13375 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT AND LAND APPEAL E014 OF 2021  
MN KULLOW, J  
SEPTEMBER 19, 2022**

**BETWEEN**

**PAUL OUMA OBARA ..... APPLICANT**

**AND**

**JACOB OSINA TUONG'O ..... RESPONDENT**

**RULING**

1. By a Notice of motion dated 21<sup>st</sup> October, 2021 the Applicant sought the following orders; -
  - a) That the Order of this Honourable court dated 21<sup>st</sup> September, 2021 be set aside.
  - b) That the Appellant's application be served and fixed for hearing.
  - c) That costs of this Application be in the cause.
2. The Application is based on the grounds thereof and the undated Supporting Affidavit of Kerario Marwa Advocate acting for the Applicant. He avers that he was never served with the Application upon which the Orders of 21.09.2021 were obtained and thus he could not file his Replying Affidavit. Further, it is his claim that the said Application was never heard interpartes.
3. He therefore urged the court to grant the orders sought in the instant Application in the interest of justice.
4. The application was opposed. The Appellant/ Respondent filed a Grounds of Opposition dated 24.02.2022 in response to the instant application. It is the Respondent's contention that the Application is incompetent, bad in law, frivolous, vexatious and an abuse of the due process of court for the reason that the Applicant's Advocate on record was duly served with the Application but he failed to respond to the same. He thus dismissed the instant Application as being a non-starter and urged the court to dismiss the same.



5. This court issued directions on the disposal of the Application by way of written submission severally. It is however regrettable that neither the Applicant nor the Respondent filed their written submissions within the stipulated timelines as directed. In the circumstances thereof, I find that both parties waived their rights to file written submission and I will proceed to issue my ruling as hereunder;
6. I am of the considered opinion that the sole issue arising for determination is: -
  - i. Whether the Applicant has made out a case for setting aside of the Orders issued on 21.09.2021 and all other consequential orders.
7. The relevant law governing setting aside judgment or dismissal is Order 12 Rule 7 of the [Civil Procedure Rules](#) which 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”
8. A Court's discretion to set aside its ruling/judgment is not restricted but should be so exercised not to cause injustice to the opposite party. It is incumbent upon the party seeking the court's favour to adduce sufficient and plausible reasons that are demonstrable and persuasive to the court. This Court retains unfettered discretion in determining whether or not to set aside such an Order. However, that discretion is not to be exercised in favour of a party that is undeserving of such an equitable remedy. In *Shah v Mbogo* 1967 E.A 116 it was held as follows;-

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice”
9. The impugned Application which the Respondent claims was not served upon him was an Application for stay of execution dated 24.08.2021. Consequently, on 21.09.2021 the court being satisfied that the Respondent was served with the said Application and documents but had failed to file any response thereto, allowed the Application and issued an order for stay of execution of the judgment dated 04/03/2021 delivered in Rongo ELC Case No. E009 of 2018 pending the hearing and determination of the Appeal and issued directions on the filing of the record of appeal within 60 days.
10. I have had the occasion to refer to the court record and I do note that there is an Affidavit of Service dated 20.09.2021 and filed on 21.09.2021 sworn by one Brian Mboya, an Advocate acting for the Appellant. In the said Affidavit he states that he personally served the Respondent's advocate on record; Kerario Marwa & Co. Advocates, on the 01.09.2021. He deposed that he served them with the Orders issued on 27.08.2021 together with the Application dated 24.03.2021 which was received and acknowledged through stamping. He attached a copy of the received and stamped copy of the Order marked as BM- 01 and a copy of the Application received and marked as BM-02.
11. I have looked at both annexures marked BM 01 and 02 as attached on the Affidavit of Service and I do note that both the Order and the extract of the Application bears the stamp of the firm of Kerario Marwa & Co. Advocates. The same has been duly signed and received on the 01.09.2021. This in my opinion is proof that service was effectively/ properly done and further proof of acknowledgment of receipt of the said documents.
12. It is therefore my considered opinion that the assertions by the Applicant herein that they were never served with the Application which gave rise to the Orders dated 21.09.2021 are an afterthought, meant



to delay the determination of the Appeal. “He who comes to equity must come with clean hands”, the Applicant herein is seeking an equitable remedy but his Application is marred with half-truths aimed at mislead the court.

**Conclusion**

13. In the premises; I find that the Notice of Motion filed on 21<sup>st</sup> October, 2021 is not merited and is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 19<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**MOHAMMED N. KULLOW**

**JUDGE**

**In presence of;-**

Non appearance for Applicant

Non appearance for the Respondent

Tom Maurice – Court Assistant

