



REPUBLIC OF KENYA



**Kailanya v Kungu & 15 others (Environment & Land Petition
E008 of 2021) [2022] KEELC 13834 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13834 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION E008 OF 2021**

CK NZILI, J

OCTOBER 26, 2022

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA AND
IN THE MATTER OF ARTICLES 22, 23 AND 165 OF THE CONSTITUTION OF
KENYA AND IN THE MATTER OF SECTION 26(1) OF THE LAND CONSOLIDATION
ACT AND IN THE MATTER OF SECTIONS 26, 27 AND 28 OF THE LAND
ADJUDICATION ACT AND IN THE MATTER OF THE LAND REGISTRATION ACT**

BETWEEN

PATRICK M KAILANYA PETITIONER

AND

ANNISIETA KUNGU 1ST RESPONDENT

WILSON KABERIAL 2ND RESPONDENT

DOMIANO MWENDA 3RD RESPONDENT

GABRIEL CHOKERA 4TH RESPONDENT

FESTUS MATHEW 5TH RESPONDENT

PAUL KIANJI THITWA 6TH RESPONDENT

ROSE KAGWIRIA 7TH RESPONDENT

SIMON WAWERU MBUGUA 8TH RESPONDENT

ISAACK MUCHENURA 9TH RESPONDENT

PATRICK KUBAI 10TH RESPONDENT

MOSES GICHURU 11TH RESPONDENT

PETER NTONJIRA 12TH RESPONDENT

WILLIAM MURIUNGI 13TH RESPONDENT



**DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER, TIGANIA
WEST DISTRICT 14TH RESPONDENT
LAND REGISTRAR TIGANIA EAST/WEST 15TH RESPONDENT
ATTORNEY GENERAL 16TH RESPONDENT**

RULING

1. This ruling relates to two applications dated 6.5.2022 by the 7th respondent and by the 11th respondent dated 4.7.2022 respectively. Both are seeking for two principal prayers namely stay of execution and setting aside of the judgment delivered by this court on 2.3.2022.
2. The applications are supported by two sworn affidavits one of Rose Kagwiria Mwimbi on the even date and another one of 15.7.2022 respectively.
3. The reasons given are; the deponent was never served with summons yet she is a registered owner of LR No. Tigania/Antuamburi/8366 issued on 6.6.2017; she has a good defense as occupant the suitland; the affidavit of service is false and some of the respondents are deceased.
4. As regards the 2nd application the same is supported by a sworn affidavit of Moses Gichuru on the even date. The grounds of the application are that he is the registered owner of LR No. Tigania/Antuamburi/5865 acquired out of purchase at the objection stage; he was never served with petition despite being in possession of the suit land since 1992.
5. The two applications are opposed through replying affidavit sworn by Patrick Kailanya on 27.6.2022 and 24.6.2022 respectively.
6. The grounds of opposition are that: Service of the petition was affected on 22.2.2021 by a process server in the company of the area chief; the applicants have never been in occupation; there has been delay and indolence; the draft reply to petition lacks merits; the applications are an afterthought and lastly the 11th applicant was present in court when the judgment was read.
7. When the application came up for hearing on 21.7.2021, Mr. Kieti senior litigation counsel for 14th – 16th respondents told the court that they were not opposed to the applications.
8. By consent of parties, the process server a Mr. George Mburugu M'Mukindia was availed for cross examination. He told the court that on 22.2.2021 he received instructions from the petitioner's advocates on record to go and effect service of an application dated 10.2.2021, a supporting affidavit, a petition and annexures upon the respondents. He testified he proceeded to the office of the chief Anjuki Location Tigania Central on 22.2.2021 and explained the purpose of his visit. While using his motor cycle, the chief accompanied him as they visited the homesteads of all the 1st-13th respondents.
9. Concerning the 7th respondent, he testified that he served her with the petition at her homestead in Kathima village which has permanent buildings, a metal gate and timber houses. The area chief also confirmed the service through a letter dated 23.6.2022 annexed thereto and in the replying affidavit of the petitioner.
10. Further he testified that he served the 11th respondent at his home not far from the 7th respondent's homestead given that he knew him personally since he had previously served him with court summons over a children's matter. He thereafter prepared and filed an affidavit of service dated 9.3.2021.



11. In cross examination, the process server admitted that he went back to Anjuki location when service was disputed after which the area chief wrote the letter dated 23.6.2022 attached to the replying affidavit since he was the one who guided him as he effected service of the petition upon the respondents. The process server admitted his affidavit of service lacked specific descriptive particulars and the purpose of the visit including the person(s) who accompanied him during the service.
12. As regards the 9th respondent-said to be dead, the process server stated he was not aware of that since it was the area chief who identified the person to him.
13. With leave of court, parties put in written submissions dated 28.7.2022 and 2.7.2022.
14. The 1st applicant submitted that the 11th respondent has an arguable defence and was not served with the petition. Guided by the decision in *Patel vs E.A Cargo Handling Services Ltd* (1974) E.A 75, he urged the court to set aside the judgment so that the matter can be heard on merits.
15. The petitioner relied on *Jomo Kenyatta University of Agriculture vs Musa Ezekiel Oebal* (2014) eKLR, *Esther Wamaita Njibia & 2 others vs Safaricom Ltd* (2014) eKLR and submitted that the applicant in the 1st application was duly served with the petition but deliberately evaded the court to obstruct or delay the court of justice. She should not therefore benefit out of her indolence.
16. In the event the court exercises discretion, the petitioner urged the court guided by *Rayat Trading Co. Ltd vs Bank of Baroda and Tetezi house Ltd* 2018 (eKLR) to impose conditions in terms of throw away costs. Further guided by Republic vs Rosemary Wairimu Munene ex parte Applicant vs Ihururu dairy Farmers Coop Society J.R No. 6 of (2004), the petitioner submitted the trouble taken to obtain the judgment should be compensated by way of costs.
17. Regarding the 2nd application the petitioner submitted that the process server's testimony in court was clear he knew the 11th respondent in person and served him with summons hence his application lacked merits or basis .Guided by *CMC Holdings Ltd vs James Mumo Nzioki* (2004) eKLR, *Francis Mutinda Mutula & 3 others vs Stephen Kivandi Kamula & 5 others* (2021) eKLR, the court is urged by the petitioner to find the judgment was regular and that there was no attached draft defense with merits.
18. The court is therefore urged in the event it exercises discretion to impose conditions as to costs guided by Rayat Trading Co. Ltd vs Bank of Baroda (supra).
19. The issues for the court to determine are: -
 - i. If there was proper service of the petition upon the 7th and 11th respondents/applicants.
 - ii. If the applicants should be given an opportunity to defend themselves and under what terms.
20. It is not in dispute that the petitioner filed his petition dated 10.2.2021 alongside an application for temporary orders whose service upon the 4th, 10th & 13th respondents entered appearance through a notice of application dated 9.3.2021, following service by Geoffrey Mburugu M'Mukiri as per the filed affidavit of service on 10.3.2021. The 14th and 15th respondents filed an application dated 20.4.2021.
21. The record shows that the 2nd, 3rd and 13th respondents filed an appearance through Ayub K. Anampiu Advocates per notice of appointment dated 12.7.2021.
22. After a consent was record on 15.7.2021, parties were ordered to comply with Order 11 of the Civil Procedure Rules. In the subsequent Orders of 6.10.2021,11.10.2021 and 24.1.2022, it is not clear if the petitioners ever served those respondents who had not entered appearance with the directions of the court.



23. The 7th & 11th respondents have urged this court to set aside the judgment and stay the orders of execution since they were condemned unheard, they hold title deeds to the suit premises and it is only fair that they be heard on merits.
24. On the other hand, the petitioner has submitted there has been indolence, delay and deliberate attempts to delay justice, hence the two deserve no discretion in their favour.
25. As indicated above after the service of the petition was made, some respondents entered appearance. The process server who served the petition the same day to those who have entered appearance unlike the applicants herein has testified that he served the two applicants, one known to him and the other after⁴ the area chief pointed out the parties and even took him to their areas of residence.
26. After listening to his testimony in court and looking at the circumstances of this petition, the court has no doubts in its mind that there was proper service of the court processes.
27. The next issue is as to whether the court should, despite proper service of summons, set aside the judgment and hear the applicants on merits.
28. The application is based on Order 10 Rule 11 *Civil Procedure Rules*.
29. Rule 14 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedures Rules (2013), require service of the petitioner within 15 days or such time as the court may direct and an affidavit of service be filed in line with form B in the schedule or such variations as may be necessary.
30. Rule 16 thereof provides that the court may hear and determine the petition in absence of the respondent while Sub rule (2) thereof grants the court the power to set aside judgment or its order under Sub-Rule (1) on its own motion or upon application by the respondent or a party affected by the orders.
31. The same position obtains to directions on the mode of disposal of the petition under Rules 22 & 25 thereof.
32. Under Rule 4 thereof the Rules are expected to facilitate the just determination, efficient use, timely disposal and cost affordable resolution of disputes in furtherance of Article 259 (1) of *the Constitution*.
33. In CMC Holdings (supra) the court held that in deciding whether or not to set aside an ex parte judgment, the discretion is to ensure a litigant does not suffer injustice or hardship as a result of inter alia an excusable mistake or error, inadvertence or accident and that there must be consideration as to why the defense was not filed and if it raises triable issues.
34. In Francis Mutula (supra) the court cited with approval James Kanyita Nderitu vs Marios Philotas Chikas & another (2014) eKLR, the Court of Appeal on consideration of setting aside a regular judgment held matters to consider include inter alia, the length of time that has elapsed since judgment, triable issues raised by the defence, prejudice to be occasioned by each party and the interests of justice.
35. In this application, the applicants have averred that they hold the title deeds to the suit properties and have been in occupation. They have attached copies of the title deeds. Similarly, the 7th respondent has attached a draft response to the petition.
36. The judgment was entered on 23.3.2022 while these applications were filed in May and July 2022 respectively. The delay of close to four months cannot be said to be inordinate. There is also no indication of what prejudice the petitioner is likely to suffer unlike the applicants if the judgment were to be set aside and the petitioner compensated by way of costs. In this application the petitioner has



not stated if he has initiated the process of execution by first extracting the decree and serving it upon the 14th – 16th respondents for its implementation.

37. In the circumstances the court is of the considered view that the applicants' right to fair hearing and access to justice should be guaranteed by giving them an opportunity to have their day in court by presenting their responses for the court to determine the matter on merits.
38. Having found that there was a proper service upon the 7th and 11th respondents, I set aside the judgment. Throw away costs of Kshs.40,000/= shall be paid by the two applicants to the petitioner within 14 days from the date hereof.
39. The respondents are granted leave to file and serve their responses to the petition within 45 days from the date hereof. Equally the petitioner is granted leave to file a supplementary affidavit if need be within 15 days after service of the responses by the respondents.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 26TH DAY OF OCTOBER, 2022

In presence of:

C/A: Kananu

Wambua for Karatu for respondents

Mrs. Muia for applicant

Kieti for 14th & 16th respondents

7th -14th respondent

HON. C.K. NZILI

ELC JUDGE

