



**Maganga v Nyasigawa & another (Environment & Land Case
39 of 2021) [2022] KEELC 13796 (KLR) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13796 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 39 OF 2021
GMA ONGONDO, J
OCTOBER 25, 2022
(FORMERLY MIGORI ELC NO. 251 OF 2017)**

BETWEEN

JOEL AYOMA MAGANGA RESPONDENT

AND

ANDREW ONYANGO NYASIGAWA 1ST APPLICANT

CAROLINE AWINO MUSA 2ND APPLICANT

RULING

1. By a notice of motion application dated May 28, 2020 and filed herein on June 11, 2020, the applicants through Tom Mboya & Co Advocates, are seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That this honourable court be pleased to vacate, vary and/or set aside the entire *ex-parte* decree given in this matter and all its consequential effects, reinstate this matter and set it down for hearing and determination on merit.
 - d. That the applicants herein be allowed to file their defence.
 - e. That the cost of this application be provided for.
 - f. That any other/ further relief that this honourable court may deem fit and proper to grant in the circumstances.



2. The application is founded upon the 1st applicant's affidavit of twelve paragraphs sworn on even date and the accompanying documents namely a copy of judgment, decree, bill of costs and draft defence and counter-claim.
3. Briefly, the applicants lament that they were never served with any summons to enter appearance or any documents related to this matter. That they were surprised when one Onyango Athiambo called them and informed them that the respondent/plaintiff herein had served him with a judgment, decree and bill of costs. That since the matter proceeded *ex-parte*, the plaintiff ought to have served them with a notice of entry of judgment before initiating any action of executing the decree. That they are desirous to prosecute the suit. Thus, they urged the honourable court to reinstate the matter and set it down for hearing and determination in accordance with article 159 of the Constitution of Kenya, 2010 and section 1A and 2A of the Civil Procedure Act, chapter 21 Laws of Kenya.
4. The plaintiff/respondent, through G S Okoth and Company Advocates, opposed the application by way of grounds of opposition dated May 18, 2022 and filed on June 9, 2022. The respondent deposed, *inter alia*, that the application is frivolous and vexatious since the applicants were properly served and received summonses and plaint but chose not to respond. That the applicants were also served with copy of the judgment and decree. Further, that the decree holder has not moved to execute the decree so the issue that notice of entry of *ex parte* judgment was not served upon the applicants does not arise.
5. The respondent averred that the conduct of the applicants is to cause undue delay in deciding the matter. That setting aside the judgment will not aid the applicants in any way. However, that should judgment be set aside, the applicants be condemned to pay throw away costs.
6. On October 1, 2020, the court ordered and directed that the application be heard by way of written submissions pursuant to order 51 rule 16 of the Civil Procedure Rules, 2010 and practice direction number 32 of the Environment and Land Court Practice Directions, 2014.
7. Accordingly, learned counsel for the applicants filed submissions dated July 18, 2022 on July 19, 2022. Counsel identified twin issues for determination thus: whether the applicants/defendants herein are entitled to the orders for setting aside the *ex-parte* judgment and who shall bear the costs of this application? Counsel submitted that the respondent shall not suffer any prejudice if the interlocutory judgment is set aside. That no proper service was effected on the applicants thus, they could not file a statement of defence in the matter. That therefore, the application ought to be allowed. Counsel relied on various authorities including the case of Tree Shade Motors Ltd v DT Dobie & Anor (1995-1998) 1EA 324, to fortify his submissions.
8. Learned counsel for the respondent did not file any submissions in this application.
9. I have duly considered the application, the grounds of opposition and the applicants' submissions. So, are the orders sought in the application merited?
10. Originally, the suit was filed at Kisii Environment and Land Court. The respondent/plaintiff generated it by way of a plaint filed on October 21, 2016 seeking, *inter alia*, an order of rectification of the register by deleting the names of the defendants from the register of land parcel numbers Suba/Kamwenda/5926 and 1819 (the 1st and 2nd suit parcels of land herein respectively) and replacing the same with the plaintiff's name. The plaintiff also sought an order of prohibitory injunction prohibiting the defendants from alienating by sale or otherwise cultivation, occupation or in any other way dealing with the suit parcels or any portions thereof in any manner adverse to the interest of the plaintiff thereto.



11. On February 13, 2017, the matter was transferred from Kisii to Migori Environment and Land Court. On November 4, 2021, the matter was further transferred from Migori Environment and Land Court to this court for hearing and determination.
12. The judgment in this case was entered on the basis of, among others, summons to enter appearance (“the summons”) dated October 24, 2016. At paragraph 4 of the said judgment, this court noted thus:

The defendants were duly served on May 23, 2018 and October 29, 2018 as shown on affidavits including the affidavit of service filed in court on November 21, 2018. However, they failed to enter appearance and or file any statement of defence within the prescribed period of time or at all.
13. The court having been satisfied that service was properly effected and the defendants were aware of the suit, proceeded with the matter according to the provisions of order 12 rule 2 (a) of the [Civil Procedure Rules, 2010](#) which gives the court discretion to proceed with hearing of a case if the defendant fails to attend court, after the court is satisfied that the defendant has or had sufficient notice of the same; see also [Ogada v Mollin](#) (2009) KLR 620.
14. The defendants, however, dispute that service was effected upon them. That therefore, they were not aware of the suit.
15. It is my considered view that an affidavit of service must prima facie disclose proper and actual service. It is on the basis of this service that judgment is entered.
16. In the affidavit of service of Osir Jacob Caleb, a licenced court process server, duly filed on November 21, 2018, it is deposed in part, as follows:
 - (3) That on the same day i.e October 4, 2018 at around 10.50 o'clock in the forenoon, with intent to effect service of the said court process, I visited the said 2nd defendant's home located directly opposite Miyare Agricultural Training centre, a few meters from Opapo centre within Miyare village of Koluoch sub location, Kamagambo North location, Rongo sub county.
 - (4) That I found the 2nd defendant at her home and served her with a copy of the hearing notice and required her signature on the principal copy thereof which signature she refused to append saying that I am a fraudster and she would not accept any more court process on a matter that does not exist on which day she vowed to harm me if I ever show up in her home.
 - (5) That on the October 29, 2018 at around 12:15 pm, I visited the 1st defendant's home located in Gwasi Central location through the area acting Chief of Gwasi central, Mr A Okoth who summoned the 1st defendant in his office where he declined to append his signature on the principal copy saying that though his name is listed as the 1st defendant he still knows that the matter does not exist and insisted that he had informed me on the same on my earlier service on the May 23, 2018.
17. I note that counsel for the defendants did not call for the process server to be cross-examined on the contents of the affidavit of service. In [Shadrack arap Baiywo v Bodi Bach](#) Ksm CA civil appeal No 122 of 1986 [1987] eKLR, the Court of Appeal quoting Chitaley and Annaji Rao; [The Code of Civil Procedure](#) volume II page 1670 stated 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...” (emphasis added).

18. This court is cognizant of the provisions under order 10 rule 11 of the Civil Procedure Rules, 2010, which grants the court unfettered discretion to set aside judgment on such terms as it deems fit and just; see *Shah v Mbogo and another* [1967] EA 116 as cited by the applicants herein.
19. Plainly, the applicants failed to demonstrate that service was not effected according to the laid down statutory requirements. Sections 107 to 109 of the Evidence Act, chapter 80 Laws of Kenya are clear that he who asserts or pleads must support the same by way of evidence.
20. It is therefore, abundantly clear that the *ex parte* judgment delivered on September 17, 2019 in this matter, is regular. I find no reason to set it aside. The application herein is unmeritorious.
21. *A fortiori*, the application dated May 28, 2020 and filed herein on June 11, 2020, is hereby dismissed with costs to the respondent.
22. It is so ordered.

DATED, DELIVERED AND SIGNED AT HOMA BAY THIS 25TH DAY OF OCTOBER 2022

G. M.A ONG'ONDO

JUDGE

Present

1. Mr. B. Mboya, Learned Counsel for the applicants/defendants
2. Mr. G. S. Okoth, Learned Counsel for the respondent/plaintiff
3. Okello and Mutiva, Court Assistants

