



**Lorkino v Lorkino (Environment & Land Case 134 of 2016)
[2022] KEELC 15031 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15031 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 134 OF 2016
FO NYAGAKA, J
NOVEMBER 24, 2022**

BETWEEN

LINGAKWANG LORKINO PLAINTIFF

AND

LOTIAM LORKINO DEFENDANT

RULING

1. The Defendant's Application dated April 8, 2022 and filed on April 11, 2022 is anchored on Section 1A, 1B, 3A & 63 (e) of the Civil Procedure Act as well as Order 12, Rule 7 and Order 51, Rule 1 of the Civil Procedure Rules. It seeks the following:
 1. ...spent.
 2. That the ex parte judgment entered on September 24, 2018, the subsequent decree and all consequential orders thereby arising be set aside and the case be heard de novo.
 3. ...spent.
 4. Any other orders the court shall deem fit to grant.
 5. Costs be in the cause.
2. The Application is supported by the ground on its face and the deposition of the Applicant. He noted that following judgment of the court on September 24, 2018, the Applicant learned from the OCS Chepareria Police Station that a Surveyor was intent on visiting the suit land on April 12, 2022 with a view to implementing the decree. He stated that the suit proceeded *ex parte* without proof of service on November 1, 2017. It is not on record that service was actually effected. Finally, the Applicant stated that he could not attend court due to health challenges. This came as a result of his involvement in two (2) road traffic accidents where he sustained serious injuries.



3. He continued that he has since 2021, gracefully gained mobility and had been attending physiotherapy clinics at Kapenguria County Hospital. He admitted that while he was served with summons to enter appearance, he was unable to secure the services of Counsel because he was bedridden. He stated that he had a good defence and ought to be given an opportunity to ventilate it. He urged this court to allow the Application.

The Response

4. The Plaintiff vehemently opposed the Application. In his Replying Affidavit sworn on July 8, 2022 and filed on July 12, 2022, the Plaintiff accused the Defendant of misleading the court as he had raised false grounds in support of his Application. He reproduced briefly, the events in the court file leading up to the judgment. He justified that at all times to the suit, the Defendant was properly served and was therefore given an opportunity throughout the case. He observed that the Defendant was a sleeping dog and only awoke when the Surveyor was intent on implementing the court order. He cited that the Application was filed inordinately having been lodged three (3) years, six (6) months and fourteen (14) days after judgment had been delivered. He urged that the Application lacked merit and ought to be dismissed with costs.

Submissions

5. The Application was disposed of by way of written submissions. The Defendant's submissions dated October 10, 2022 were filed on October 14, 2022. The Defendant remained emphatic that he was not served. He opined that service was effected at the Trading Centre and was thus not personal. Since he had suffered grievous injuries, he posited that he ought to have been served at his domicile. He further challenged the service of the Notice to Show Cause as it did not disclose with specificity where his home was. Finally, he submitted that he had a good defence.
6. The Plaintiff filed his submissions dated July 8, 2022 on October 21, 2022. The Plaintiff pointed out that service of pleadings and various documents was not impugned yet the manner of service remained the same. In fact, the Defendant admitted that he had been served with summons to enter appearance. He challenged the veracity of the Defendant's allegations in that he was involved in two (2) road traffic accidents as no documentary evidence was furnished.
7. He submitted that there was no defence on record. However, I have taken note that a cursory perusal of the court file reveals that the Defendant indeed filed his statement of Defence on October 17, 2016 after entering appearance on September 29, 2016. The claim that there is no defence on record is thus misleading.
8. Finally, the Defendant submitted that the Application was inordinately delayed adding that no grounds had been adduced to warrant the exercise of this court's discretion.

Analysis And Disposition

9. The objective behind setting aside judgment was articulated in the celebrated case of *Shah vs. Mbogo & another* [1967] EA 116 where the court held thus:

“I have carefully considered, in relation to the present Application, the principles governing the exercise of the court's discretion to set aside a judgment obtained ex-parte. 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.”

10. Order 12, Rule 7 of the *Civil Procedure Rules* provides that the court may set aside an *ex parte* judgment on such terms as may be just. As held by the case of *Patel vs. East Africa Cargo Handling Services Ltd* (1974) EA 75:

“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 to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J. put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

11. When this matter was poised to be heard on November 1, 2017, the Plaintiff engaged the services of a court process server to effect service upon the Defendant acting pro se. At paragraph four (4) of the deponent’s Return of Service, it was deposed as follows:

“I contacted the Defendant through his mobile number 0725225XXX, whom then we met at Chepraria Centre at about 2 pm. I introduced myself and the purpose of my visit then effected service upon him. He accepted the same but declined to sign on the principal copy.”

12. It was on the strength of the depositions in the Return of Service that the court noted that service was properly effected. The court at paragraph five (5) of its judgment, observed that the Defendant was served with the hearing notice indicative that the suit would be heard on November 1, 2017. Furthermore, the deponent disclosed the Defendant’s mobile number which was not denied. However, he failed to appear. He was personally served given the descriptive details furnished in the Return of Service that was not contested. I therefore find and hold that indeed the Defendant had been properly served with the hearing notice.

13. I further observe that the matter was adjourned to July 26, 2018 for further hearing. I have looked at the court record. I have observed that indeed the Plaintiff did not serve the Defendant with a hearing notice for that day. As emphasized by decisions in our jurisdiction, the main concern of the court is to do justice to the parties. To the extent that the Defendant ought to have been served with a hearing notice for July 26, 2018, the question whether the judgment entered was regular comes into play.

14. Contra, I note, and as rightly pointed out by the Plaintiff, the Defendant instituted this Application more than three and a half years (3½) after judgment had been entered. No satisfactory explanation was brought before this court to justify such inexcusable delay.

15. The Defendant alleged that he had been involved in two (2) grisly road traffic accidents that left him bed ridden. However, no evidence was adduced in support of these averments. Additionally, I observe that the Defendant, in support of this Application stated that he was unable to attend court on the hearing date initially. This then makes this court wonder whether he was dissatisfied with the fact that he was not served or was he intent on not attending court on the said date, thereby being aware of the hearing date but electing to abscond court attendance.

16. I have also looked at the Defendant’s statement of Defence. It raised jurisdictional issues. He further stated that the Plaintiff had no locus standi to institute suit as he was the registered proprietor of the



suit land. These are indeed triable issues that would go to the root of having the Defendant being given leave to ventilate his case.

17. I take note that the Application was foolhardy inordinate having been instituted a whooping three and half (3 ½) years later. This court will not condone such actions. It is also noted that execution process had commenced. However, it cannot be wished away that the Defendant was not served with a further hearing notice when the matter proceeded for hearing on July 26, 2018. The right to be heard is a prerequisite to the right to a fair trial that remains an unlimited inalienable right enshrined in Article 25 (c) of the Constitution. Noting that the Application would deny the Plaintiff the benefit of enjoying the fruits of the judgment, this court will balance the competing interests.

Orders And Dispositions

18. In light of the above, I make the following consequential orders:
1. The *ex parte* judgment entered on September 24, 2018 and all consequential orders be and are hereby set aside to the extent that the Plaintiff's case is opened for cross examination of the Plaintiff.
 2. The Defendant shall pay the Plaintiff thrown away costs in the sum of Kshs. 70,000.00 within the next fourteen (14) days from the date of this order failing which the order in one (1) shall automatically lapse without any further reference to the court.
 3. The Defendant shall file and serve its bundle of documents that it intends to rely on within the next twenty one (21) days from the date of this order failing which the order in one (1) above shall lapse automatically without any further reference to the court.
 4. The matter shall be mentioned on January 18, 2023 to take a hearing date.
19. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS
24TH DAY OF NOVEMBER 2022**

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE

