



Munguti & 2 others (Suing as administrators and legal representatives of the Late Muange Musau (Deceased)) v Kinuthia & 3 others (Environment & Land Case 184 of 2017) [2022] KEELC 15070 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15070 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 184 OF 2017
A NYUKURI, J
NOVEMBER 24, 2022

BETWEEN

MATHEW MUANGE MUNGUTI 1ST PLAINTIFF
BENEDICT KIONZO MUANGE 2ND PLAINTIFF
STEPHEN MUSAU MUANGE 3RD PLAINTIFF
SUING AS ADMINISTRATORS AND LEGAL REPRESENTATIVES OF THE
LATE MUANGE MUSAU (DECEASED)

AND

HENRY KURIA KINUTHIA 1ST DEFENDANT
LAND REGISTRAR MACHAKOS 2ND DEFENDANT
KOMAROCK RANCHING & FARMING SOCIETY LTD 3RD DEFENDANT
KOMAROCK HOUSING COOPERATIVE SOCIETY LIMITED 4TH
DEFENDANT

RULING

1. Before court is a notice of motion dated March 4, 2022, filed by the plaintiffs/applicants seeking the following orders;
 - a. Spent
 - b. That this file be placed under lock and key in the 1st instance.



- c. That the honorable court be pleased to set aside the orders given on 3/08/2021 and 20/09/2021 which were given out of a forged stamp on a hearing notice, causing the suit to be dismissed ex-parte and consequently allow the case to be heard and determined on its merits.
 - d. Spent
 - e. That the 1st defendant/respondent by himself, his servants, agents and or employees or anyone whomsoever claiming under them be compelled by an order of injunction restraining them from entering, disposing of or developing land parcels Donyo Sabuk/komarock Block 1/62415 & 62416 or from doing any other prejudicial act thereon pending the hearing and determination of the main suit herein.
 - f. That the status quo be maintained pending hearing and determination of the suit.
 - g. That the honorable court be pleased to order cross-examination of the process server, John Maina W, on the mode of service.
 - h. That the costs of this application be awarded to the plaintiff/applicant.
2. The application is premised on the supporting affidavits sworn by Mathew Muange Munguti the plaintiff herein. The applicants' case is that they filed a case against the 1st defendant after he had fraudulently transferred the Parcel of land known as Donyo Sabuk/komarock Block 1/547 from the deceased and sub-divided it into Donyo Sabuk/komarock Block 1/62415 & Donyo Sabuk/komarock Block 1/62416 (hereinafter referred to as the suit properties) without the prior knowledge or consent of his beneficiaries or any court order.
 3. He further stated that to prove service of hearing notice upon the applicant, the 1st respondent used forged documents to obtain the orders dismissing this suit. That he used a forged stamp on the hearing notice dated 17th August 2021 which stamp did not belong to the applicant's counsel. he stated that together with the other beneficiaries of the estate of the deceased, they stand to suffer irreparable harm if the 1st defendant/respondent is allowed access to the suit properties when the matter has not fully been heard and determined.
 4. The application was opposed. The 1st defendant/respondent filed a replying affidavit dated March 23, 2022. It was the Respondent's assertion that he filed an application for dismissal of the suit for want of prosecution as one year had already elapsed. That the application and the hearing notice were served on the Applicant's counsel via email and his mobile phone. Further that the Applicant's counsel was served with a hearing notice dated August 17, 2021, indicating that hearing was scheduled for September 20, 2021.
 5. He deposed that despite being served with the hearing notice, the Plaintiffs did not file any response. His position was that on July 28, 2021, the court fixed the matter for hearing on September 20, 2021, and ordered that if the plaintiffs will not have filed response to the application, the same will stand dismissed for want of prosecution. That on September 20, 2021, the applicant had not filed a response to the application and the court ordered the suit to be dismissed with costs and interlocutory orders discharged. He also averred that the allegation that they forged the plaintiffs' counsel's stamp was false, but that the counsel for the applicant was trying to salvage a dismissed suit by all means.
 6. Further, that despite being aware that the suit was dismissed, on October 5, 2021, the applicants' counsel fixed the matter for mention on November 1, 2021, which date he not only failed to serve the respondent's counsel, but also failed to attend court, whereof the court reiterated that the suit stood



dismissed. The respondent maintained that the applicants were not residing on the land, hence no irreparable injury would be suffered by them.

7. His position was that forgery is a criminal offence and that if it were true that it happened, counsel would have preferred criminal proceedings against the process server. He stated that he already filed ELC No. 18 of 2022 which is between the same parties herein and that therefore the Applicants' issues can be determined in that suit.
8. The application was canvassed by way of written submissions. The applicants filed their submissions and supplementary submissions on April 8, 2022 and April 26, 2022, respectively while the Respondent filed his submissions on April 14, 2022.

Applicant's Submissions

9. Counsel for the applicant submitted that the firm of Kamunye Gichigi Advocates which alleged to have served the applicants' counsel although still on record, chose not to respond to the application. It was further submitted for the applicants that if there is any doubt about service, the court may order cross-examination of the process-server, but that the same was unnecessary as the applicants' assertions on non-service were not adequately rebutted. Counsel also argued that there was no evidence of service by email or phone.

Respondent's Submissions

10. Counsel for the respondent submitted that the plaintiffs' advocate denied being served on July 26, 2021 and also notified via his mobile phone number. That he however neither denies the email address provided by the Respondent as being his official office email nor the phone number as stated by the Respondent as being his personal mobile phone number.
11. Counsel contended that the plaintiffs were duly served but chose not to appear. That however, if the court is of the considered opinion that the process server should be cross-examined on the contents of his affidavit, they shall avail him.
12. Counsel relied on the case of *Karatina Garments Limited v Nyanarua* [1976] KLR 94 where it was held that;

Where one party to proceedings denies to having been served with a relevant document, it is proper for the court to look into the matter, if the court is faced with conflicting affidavits as to the alleged service of process, it is proper that the deponents should be examined on oath in order to establish the truth.
13. Counsel referred to the case of *Ronald Mackenzie v Damaris Kiarie* [2021] eKLR for the proposition that it is upon the plaintiff to take steps to prosecute their suit.
14. Counsel further submitted that the applicants had to prove the requirements needed in order to obtain an order of Interlocutory injunction.
15. Counsel finally submitted that for a suit to be reinstated reasonable grounds have to be advanced and from the instant application, no such reasons have been advanced, therefore the plaintiffs/applicants will not suffer any loss if the suit is not reinstated.



Analysis and Determination

16. I have considered the application, the response as well as parties' submissions. In my considered view, the issue that arises for determination is whether the court should set aside the orders made on 3/08/2021 and 20/09/2021.
17. Setting aside orders made without service of notice is a matter of right for the aggrieved party, as no one should be condemned unheard. The right to be heard is a constitutional right which must be upheld. The court has inherent power to ensure that substantive justice is done for all the parties in a suit. In the case of *Ali Bin Khamis v. Salim Khamis Korobe & 2 others* [1956] 23 EACA 195 cited with approval in the case of *Gulf Fabricators v County Government of Siaya* [2020] eKLR, it was held that an order made without service of summons to enter appearance is a nullity which must be set aside ex debito justitiae.
18. However, where there was service, the court has discretion to set aside ex parte proceedings or orders if the ends of justice so demand. However, discretion must be exercised judiciously and not whimsically. In the case of *Shah vs Mbogo and another* [1967] EA 116, the Court of Appeal of East Africa held as follows:

"This discretion (to set aside Ex parte proceedings or decision) 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."
19. On the issue of service, order 5 rules 8, 22B, and 22C allow for personal service, or service through Electronic mail (E-mail) and by Mobile enabled-messaging.
20. Therefore, service by email, mobile-enabled messaging and physical service are all proper ways of service under our laws. The real issue in the instant application is whether service was effected. To determine this matter, I will first set out the short history that led to the application before court. On July 15, 2021, this file was placed before court in chambers, in the absence of both parties, pursuant to an application dated July 14, 2021, brought under Certificate of Urgency by the 1st defendant seeking dismissal of this suit for want of prosecution. On the said date, the application was certified urgent and scheduled for interpartes hearing on July 28, 2021. On July 28, 2021, Mr. Gichigi advocate for the applicant appeared for the 1st defendant while there was no appearance for the plaintiffs. Mr. Gichigi informed court that he served the respondent and no response was filed. On that premise, the court fixed the matter for hearing on September 20, 2021, and ordered that if the plaintiff will not have responded to the application, the suit will stand dismissed for want of prosecution.
21. On September 20, 2021, only Mr. Gichigi advocate attended court as there was no appearance for the Plaintiff. He stated that he had served counsel for the Plaintiff and referred the court to the affidavit of service dated September 8, 2021 whereof a hearing notice with an apparent stamp of Mutuku and Company Advocates was endorsed on August 24, 2021. The court being satisfied with service of hearing notice in respect of the 1st Defendant's application dated July 14, 2021, proceeded to dismiss the suit for want of prosecution.
22. It is after the said dismissal that Mr. Mutuku filed the instant application, vehemently denying service of the hearing notice herein above stated. The impugned hearing notice as well as the return of service were drawn by the firm of Kamunye Gichigi Advocates. That firm is still on record for the 1st defendant to date. On February 15, 2022, the firm of D.K. Muema filed a Notice of Appointment to act jointly with the firm of Kamunye Gichigi for the 1st defendant. The record shows that the impugned service



was effected under instructions from the firm of Kamunye and Gichigi Advocates. However, despite the grave allegations of forgery, no response was filed by the firm of Kamunye and Gichigi.

23. In my view, as the orders of July 28, 2021, were made in the absence of the Plaintiff or his counsel, which orders specifically stated that if the Plaintiff will not have responded to the application dated July 14, 2021, before 20th September 2021, the suit will stand dismissed; the 1st Defendant's counsel was under legal duty to extract those orders and serve them upon counsel for the plaintiff, in good time. There is no evidence or allegation that the said orders were ever served. The 1st defendant's counsel has stated that he served counsel for the Plaintiff with the application and hearing notice through the latter's email and mobile phone. He has however not attached any evidence of such service by email or mobile phone. In my view, it was not sufficient to correctly mention the email address and phone number of the Plaintiff's counsel. Knowledge and service are different matters.
24. In the premises, I find and hold that the plaintiff is deserving of the orders for setting aside the orders made on July 28, 2021, and issued on August 3, 2021, and orders made on September 20, 2021.
25. On the issue of whether the applicant is deserving of orders of injunction, the same are discretionary orders which discretion must be exercised judiciously. In that respect, I note that pursuant to the plaintiff's application dated April 13, 2017, the same was compromised and orders of status quo granted on March 8, 2018, pending hearing and determination of this suit. On September 26, 2019, the plaintiff was granted a last adjournment for their failure to comply with order 11 of the Civil Procedure Rules. Besides, before counsel for the 1st defendant applied to have the suit dismissed for want of prosecution, the last time the matter had been in court was on November 27, 2019. As the Plaintiffs have not demonstrated interest in prosecuting this matter, their conduct is not deserving of any interlocutory order.
26. In the premises I make the following orders;
 - a. The orders issued on August 3, 2021 and September 20, 2021 be and are hereby set aside, with each party bearing their own costs of the application.
 - b. The plaintiff to file and serve his response to the 1st defendant's application dated July 14, 2021, within 14 days of this ruling. The respondent is granted leave to file supplementary affidavit if need be, within 7 days of service.
 - c. Parties shall file and exchange written submissions in respect of the application dated July 14, 2021, within 30 days of this ruling.
 - d. The application dated July 14, 2021, shall be heard interpartes on 1/3/2023.
27. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24TH DAY OF NOVEMBER 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Mutuku for the Plaintiffs/Applicants.

No appearance for the Respondents.

Ms Josephine Misigo – Court Assistant

