



Mutheka & 2 others (Suing as personal representatives of the Estate of Mbengei Ndala (Deceased)) v Katelembo Co-operative Society & another (Environment & Land Case 123 of 2014) [2022] KEELC 14839 (KLR) (16 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14839 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 123 OF 2014
CA OCHIENG, J
NOVEMBER 16, 2022**

BETWEEN

**STEPHEN MUANGE MUTHEKA 1ST PLAINTIFF
NGONDU NDETO 2ND PLAINTIFF
KAVUNGE MWATIKE 3RD PLAINTIFF
SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF MBENGEI
NDALA (DECEASED)**

AND

**KATELEMBO CO-OPERATIVE SOCIETY 1ST DEFENDANT
STEPHEN MAITHA MANG’OKA 2ND DEFENDANT**

RULING

1. What is before Court for determination is the Defendants’ Notice of Motion Application dated the 22nd October, 2018 where they are seeking the following orders:
 - a) Spent
 - b) Spent
 - c) That the Honourable Court be pleased to set aside the interlocutory Judgment endorsed on 14th April 2015 and the Judgment dated 3rd March 2017 and all consequential orders thereto.
 - d) That the Honourable Court be pleased to set aside the proceedings herein.
 - e) That the Honourable Court be pleased to grant the Applicant leave to file and serve his Defence and to defend the instant suit have the same determined on merits.



- f) That the annexed draft Defence be deemed as duly filed and served upon the Respondents and their Advocates on record subject to further orders on compliance with Order 11 and the Civil Procedure Rules.
2. The Application is based on grounds on the face of it and supported by the Affidavit of one Stephen Maithya Mang'oka. He deposes that he was not served with any court documents and averred that the Plaintiff misled the court to obtain an interlocutory Judgment against him. He expresses his intention to cross-examine the alleged service by one Patrick Juma. He avers that he was the registered owner of the land parcel number Athi River/athi River Block 1/1124 following a lawful sale on 24th December 2012. Further, that the suit land was subject to another court case, being Machakos Cmcc No.709 Of 2013. He claims to have a good defence with triable issues which ought to be canvassed on merit. He sought to be granted his constitutional right to a fair hearing lest he suffers irreparable harm.
3. The Application was opposed by the Plaintiffs who filed a Replying Affidavit where they depose that the Defendants were duly served as evident in the Affidavit of Service deponed on 11th March 2015. They aver that upon being served with the court documents, the Defendants abandoned the suit number Machakos CMCC No. 709 of 2013 which is now inactive. They state that the Defendants did not deserve the orders sought as they had ignored the service upon them.
4. The 2nd Defendant filed a Further Affidavit sworn on 10th July, 2019. He reiterated the contents of his earlier Affidavit and further deposes that the process-server fabricated the averments in the Affidavit of Service since he has never been in the alleged vehicle nor was he with his sister on the said date of service. As to the claim by the Respondents that they had abandoned Machakos CMCC No. 709 of 2018, he insists that the matter is still active and he had an invite from counsel for the Defendants therein to fix a mention date on 28th June, 2018 and that vide the determination of the famous Malindi Constitutional Petition No. 3 of 2016, the subordinate courts were barred from hearing and determining land matters.

Analysis and determination

5. Upon consideration of the Notice of Motion Application dated 22nd October, 2018 including the respective Affidavits, annexures thereon and submissions, the only issue for determination is whether the Judgment delivered on 3rd March, 2017 should be set aside and the 2nd Defendant granted leave to defend this suit.
6. On whether the Applicant has met the threshold set, in setting aside the Judgment delivered on 3rd March 2017, I will proceed to make reference to Order 10 Rule 11 of the *Civil Procedure Act* Cap 21 which stipulates thus:
- “Where Judgment has been entered under this Order the court may set aside or vary such Judgment and any consequential decree or order upon such terms as are just.”
7. The 2nd Defendant seeks to set aside the Judgment herein alleging that he was not served. From the Court record I note this matter proceeded for hearing and Justice Angote entered a regular Judgment on 3rd March, 2017 directing that the suit land revert back to the Estate of Mbengei Ndala. From the documents produced, Mbengei Ndala died on 1st September, 1985 and the Grant of Letters of Administration Intestate were issued on 19th March, 2014 to Stephen Muange Mutheke, Ngondu Ndeto and Kavunge Mwatike. The 2nd Defendant contends that he purchased the land from Stephen Muange Mutheke vide a Sale Agreement dated 24th December, 2012 and obtained his Certificate of Title. He insists that he was not served with summons to enter appearance and has sought for the process-server to be examined.



8. It is trite that setting aside of a Judgment is discretionary so long as the court can prove that a party was not served.

9. In the case of *Mwala v Kenya Bureau of Standards* EA LR [2001] 1 EA 148, the court stated:

“To all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito justitiae for a court should never countenance an irregular judgment on its record.”

10. Further, in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR the Court while dealing with the issue of setting aside of a Judgment observed that:

“The well-established principles of setting aside interlocutory judgements were laid out in the case of *Patel vs East Africa Cargo Handling Services* [12] where Duffus, V.P. stated; “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. The fact that setting aside is a discretion of the court is not disputed. What is contested is whether the applicant has demonstrated “sufficient cause” to warrant the exercise of the courts discretion in its favour. I again repeat the question what does the phrase “Sufficient cause” mean. The Supreme Court of India in the case of *Parimal vs Veena* observed that:-

“sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously.”

The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from



doing substantial justice and doing away with the illegality perpetuated on the basis of the judgement impugned before it.”

12. In the current scenario, I note the instant Application was filed on 22nd October, 2018 while the impugned Judgment had been delivered on 3rd March, 2017. The 2nd Defendant claims he was not duly served but in the Further Affidavit he avers that he did not proceed with Machakos CMCC No. 709 of 2013 due to the Judgment in Malindi Petition No. 3 of 2016. The Respondent did file an Affidavit of Service dated 11th March, 2015 sworn by Patrick Juma wherein the process-server described his mode of service in person to the 2nd Defendant. I wish to reproduce an excerpt from the said Affidavit of Service from the process-server.

- “ 8. That I thereafter started investigations on how to reach the 2nd Defendant.
9. That I called a Mr. Stephen Muange Mutheka who is one of the Plaintiff in this matter.
10. That the said Stephen informed me that the 2nd Defendant is a very slippery person but informed me that the 2nd Defendant has another case at Machakos Law Courts which was slated for hearing on the 11th March, 2015.
11. That I requested the said Mr. Stephen to come to court on that day at Machakos and point out to me the 2nd Defendant herein.
12. That on the 11th March, 2015, I met with the said Mr. Stephen at Machakos Law Courts where he pointed out to me the 2nd Defendant who was seated in a Toyota Registration Number KBJ 510Z in the company of a lady whom I was told by Stephen was a sister to the 2nd Defendant.
13. That I approached the 2nd Defendant and introduced myself and explained to him that I had court summons and a Plaint for service upon him.
14. That the 2nd Defendant acknowledged receipt but on the face of my copy.
15. That a copy of the same is hereby returned to the Honourable Court duly served.”

13. From this excerpt, noting that it is the alleged vendor Stephen Muange who pointed out the 2nd Defendant to the process-server, I find that process-server has clearly demonstrated the mode of service and I have no reason to doubt that the 2nd Defendant was indeed served with the summons to enter appearance but simply ignored to defend the suit. Further, since the suit land was reverted to the Estate of the deceased owner who never sold it to the 2nd Defendant, I find that he has not demonstrated sufficient cause why the Judgment delivered on 3rd March, 2017 should be set aside. I opine that he can sue the vendor Stephen Mbengei to refund him his purchase price as the Plaintiffs pleaded that they sold the land to one Justus Itumu. In the circumstances, while associating myself with the decisions I have cited and relying on legal provisions I have quoted, I decline to set aside the Judgment delivered on 3rd March, 2017.

14. In the foregoing, I find the instant Notice of Motion Application dated 22nd October, 2018 unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF NOVEMBER, 2022



CHRISTINE OCHIENG
JUDGE

