



REPUBLIC OF KENYA



KENYA LAW
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Koriata & another v Furahia Africa Limited (Environment & Land Case 55 of 2018) [2022] KEELC 14755 (KLR) (15 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14755 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 55 OF 2018
CG MBOGO, J
NOVEMBER 15, 2022**

BETWEEN

NTOORIAN KORIATA 1ST PLAINTIFF

SAMSON OLOLMAITAI 2ND PLAINTIFF

AND

FURAHIA AFRICA LIMITED DEFENDANT

RULING

1. Before this court for determination is a notice of motion application dated October 11, 2022 expressed to be brought under order 22 rules 22 and 25, order 10 rule 11 and order 51 rule 15 of the Civil Procedure Rules, section 3A of the Civil Procedure Act and article 159 of the Constitution seeking the following orders: -
 1. Spent.
 2. That this honourable court be pleased to order a stay of execution of the *ex-parte* judgment and decree delivered on July 28, 2022 pending the hearing and determination of this application.
 3. That this honourable court be pleased to set aside ex-debito justitiae the *ex-parte* judgment entered on the July 28, 2022 and all the consequential orders;
 4. That necessary directions do issue.
 5. That the costs of this application be provided for.
2. The application is premised on the grounds inter alia that judgment was apparently procured relying on affidavits of service dated September 3, 2018 denoting service upon the defendant by way of registered post and that contrary to the plaintiffs' claims, no service was ever effected upon it and that



the defendant only learnt of the existence of this matter on September 27, 2022 when its director was served with a draft decree for approval via email by the plaintiffs' counsel.

3. The application is supported by the affidavit of Hon Franklin Kipngetich Arap Bett, the applicant's director sworn on even date. The applicant deposed that on September 27, 2022, he was served with a draft decree for approval via email by the respondents' counsel and it was upon receipt of the email that he discovered that an *ex-parte* judgment had been entered in default of appearance. The applicant further deposed that upon perusal of the court record, they discovered that judgment had been procured relying on an affidavit of service denoting service by way of registered post. Further that even though service was claimed to have been effected upon the defendant by way of registered post, no certificate of posting was attached to the affidavit of service submitted by the respondents and that at all material times prior to the institution of this suit, communication was done via email between the parties herein and their respective agents and advocates.
4. Further, that the mode of service employed by the respondents was not proven to have been completed and was aimed at hoodwinking the court that the applicant had been served. As such, the suit was only lodged and its existence concealed until judgment was procured in a bid to steal the match against it.
5. The respondents filed grounds of opposition dated October 19, 2022 in opposition to the application on the following grounds: -
 1. That the said motion is frivolous, vexatious and a gross abuse of the court process as the defendant has not meritorious substratum of any defence, let alone an arguable defence produced before the honourable court.
 2. Neither the decree nor the judgment sought to be set aside have been produced by the applicant as by law envisaged, for the defendant to demonstrate any unjust, oppressive, or unlawful aspect thereof.
 3. The regularity of the judgment herein entered by the court has not been impeached and no sound bases for the exercise of the discretionary power to set aside the said regular judgment have been demonstrated.
 4. The affidavit of service by the plaintiff's process server has not been impugned or otherwise impeached nor his cross examination sought.
 5. No prejudice of any sort has been demonstrated that is likely to be visited upon, has been visited upon or will be visited on the defendant by the lawful execution of the regular judgment herein given.
 6. No undertaking has been given by the defendant as to the costs, damages or awarded lease sums per the judgment on record as a sign of good faith for the consideration of the grant of the plea sought.
 7. The motion is incompetent as the prayers sought lead to an unjust dead end of the proceedings as originally files in breach of article 159 (2)(b) of the Constitution and the motion is therefore invalid.
6. The application was further opposed by the replying affidavit of the 1st respondent sworn on October 11, 2022. The 1st respondent deposed that the deposition of the applicant is laced with bad faith for a party seeking to set aside *ex-parte* regular judgment as it does not refer to the lease whatsoever, does not deny or refute any contents of *ex-parte* judgment and does not deny that the defendant was rightly sued. The 1st respondent further deposed that upon receipt of the email address the applicant did not



- refute the process to their advocates or even seek clarification on the judgment and decree. Further, that the postal address was used for service of process on the defendant and a certificate of postage was issued and it is the same postal address that was used for the subject lease. Also, that the defendant not denying operating the said postal address is estopped from otherwise denying service of process on the defendant and that at no time thereafter that the postal address, ceased being used by the defendant.
7. The 1st respondent further deposed that the applicant cannot in the circumstances appropiate assigning the postal address to the subject lease and reprobate in regard to its stated postal address and the legal service effected via the same postal address. In addition, that a presumption of the correctness and veracity of service as stated in the process server's is made in such arising circumstances and the burden lies on the party questioning it to show that the return is incorrect and as such, there is nothing of substance to negate the claim they lodged. Further, that it would be illogical for the respondent to communicate exclusively via email whereas the lease agreement clearly stipulated that any writing in respect of the lease should be in writing and posted to the applicant's postal address. Further, that the regular judgment cannot be set aside merely for the sake of it as it has not been shown any defence arguable at all.
 8. In conclusion the 1st respondent deposed that they have taken possession of the suit property under the terms of the judgment and there is nothing to stay and for this reason the application has been overtaken by events.
 9. The application was disposed off by way of written submissions. The applicant filed written submissions dated October 25, 2022 and raised one issue for determination which is whether the judgment entered against the defendant is regular.
 10. The applicant submitted that service upon the defendant ought to have been effected in accordance with the provisions of order 5 rule 3 of the [Civil Procedure Rules](#) and that the process server did not make attempts to effect service upon the principal officers of the applicant. The applicant relied on the cases of [Agigreen Consulting Corp Limited v National Irrigation Board \[2020\] eKLR](#) and [Total Kenya Limited v Supa Hauliers Limited \[2003\] eKLR](#). The applicant submitted that the purported service by registered post was improper hence irregular and that no evidence of service by way of registered post was attached to the said affidavit of service. The applicant further relied on the case of [Gulf Fabricators v County Government of Siaya \[2020\] eKLR](#).
 11. The applicant further submitted that the certificate of posting contained in the annexure is not legible and does not contain the date it was filed in court despite bearing the stamp of the court which is not discernible. Further, that communication between the parties was always done via email. The applicant relied on the case of [James Kanyita Nderitu v Marie Philotas Ghika & Another \[2016\] eKLR](#) CA No 6 of 2015.
 12. The respondents filed written submissions dated October 19, 2022 wherein they raised two issues for determination as follows: -
 1. Whether the defendant's/applicant's notice of motion application dated October 11, 2022 is merited.
 2. What orders should issue in the circumstances.
 13. The respondents submitted that no evidence of transgression of the applicable law was demonstrated by the applicant and that the respondents in compliance with order 5 rule 3 of the [Civil Procedure Rules](#), proved that they had duly served the applicant with summons to enter appearance and the plaint. The respondents submitted that the applicant has not denied operating the postal address and nothing



has been presented to this court to impeach the respondent's process server. The respondents relied on the text in *Chitale and Annaji Rao*, "The Code of Civil Procedure" Volume II page 1670.

14. The respondents further submitted that the burden of proof of alleged non-service squarely lies with the applicants and it failed to dislodge that burden. The respondents relied on the case of *David Koome Matugi v APA Insurance Limited [2021] eKLR*. The respondents submitted that under order 10 rule 11 of the *Civil Procedure Rules*, this court has unfettered discretion to set aside judgment but cannot do so blindly and in the result, it cannot be fit or just to punish the respondents for having complied with the relevant law in defence of their right to access justice.
15. The respondents further submitted that they have already taken possession of the suit property and the application is overtaken by events. They submitted that the applicant cannot have the respondents shoulder the consequences of their default in meeting its business financial obligations. The respondents relied on the cases of *Shah v Mbogo & Another [1967] EA*, *Water Painters International v Benjamin Ko'goo t/a Group of Women in Agriculture Kochieng (Gwako) Ministries [2014] eKLR*, *Jomo Kenyatta and University of Agriculture and Technology v Musa Ezekiel Oebal [2014] eKLR* and *Rayat Trading Company Limited v Bank of Baroda & Tetezi House Limited [2018] eKLR*.
16. The respondents further submitted that a party seeking to set aside judgment ought to demonstrate that they have a defence that raises triable issues but in this case, no such defence has been availed to the court. The respondents relied on the cases of *Shadrack Arap Baiywo v Bodi Bach [1987] eKLR*, *Gulf Fabricators v County Government of Siaya [2020] eKLR*, *Thomas Odhiambo Okello v Peter Wanyama [2019] eKLR*, *Nelly Wanjiru Njenga v Robinson Maina & 3 Others [2021] eKLR*, *Flora Cheronu v Mary Njihia & 7 Others; Daniel Nyaga Munyambo & 7 Others [2021] eKLR*, *Carol Silcock v Sharif Mobamed [2013] eKLR* and *Stephen Wanyee Roki v K-Rep Bank Limited & 2 Others [2018] eKLR*.
17. I have analysed and considered the application, grounds of opposition, replying affidavit and the written submissions filed by both parties and the issue for determination is whether the application dated October 11, 2022 has merit.
18. The provisions of order 5 rule 3 of the *Civil Procedure Rules* that deals with service on a corporation states that: -

“Subject to any other written law, where the suit is against a corporation the summons may be served—

- (a) on the secretary, director or other principal officer of the corporation; or
- (b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3(a)—
 - (i) by leaving it at the registered office of the corporation;
 - (ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or
 - (iii) if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or



(iv) by sending it by registered post to the last known postal address of the corporation.”

19. My understanding of the above proviso of the law is that a party has the option of electing the mode of service upon which to effect court documents. In this case, the plaintiffs’ opted to serve the plaint and the summons via registered post. As it can be seen from the affidavit of service of sworn on September 3, 2018, Lukas Omolo Ogutu deposed that he was instructed to effect service via registered post. He effected service and attached the original receipt dated August 10, 2018. The said receipt is legible and can be discerned. Also, accompanying the plaint is a letter dated August 10, 2018 and written by counsel for the respondents informing the applicant of service through registered post.
20. Interestingly, the applicant has not denied or proved that the postal address does not belong to it and neither was it not in use at the time. I am satisfied that indeed there was proper service upon the applicant and therefore the judgment was regular.
21. This court nonetheless has the discretion to set aside a judgment obtained in default of the other party entering appearance or filing a defence. The principles governing the exercise of such judicial discretion are that there are no limits or restrictions on the judge’s discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties. However, this discretion is intended to be exercised to avoid injustice or hardship resulting from accidents, inadvertence or excusable mistake or error but is not designed to assist a person who has sought, whether by evasion or otherwise, to obstruct or delay the cause of justice. In the case of *Shah v Mbogo (1967) EA 116*, the principles applied before setting aside of judgment were enunciated as follows;
- “Applying the principles that the court’s discretion to set aside an *ex parte* judgement is intended to be exercised to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice.”
22. I will also place reliance in *Patel v East Africa Cargo Services Ltd (1974) EA 75* where the court expressed itself as follows:
- “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 ... where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits.”
23. Even if this court were to exercise discretion, the applicant has not availed a draft statement of defence to enable it make a determination whether the same raises triable issues. The applicant has also not sought leave to defend the suit. In the circumstance, I do find that the instant application has not been made in good faith.
24. Arising from the above, the notice of motion dated October 11, 2022 lacks merit and the same is dismissed with costs to the respondents. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL on this 15th day of NOVEMBER, 2022.

Hon MBOGO CG.

JUDGE

November 15, 2022.

