



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Mandal & another (Environment & Land Case 9 of 2021)
[2022] KEELC 14636 (KLR) (9 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14636 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 9 OF 2021
A NYUKURI, J
NOVEMBER 9, 2022**

BETWEEN

PINA WAIHERA KAMAU PLAINTIFF

AND

SHMINA MANDAL 1ST DEFENDANT

SHALEN MANDAL 2ND DEFENDANT

RULING

Introduction

1. Vide a Notice of Motion dated January 18, 2022, the defendants in this suit sought the following orders;
 1. Spent
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 4. That this Honourable Court be pleased to set aside all that judgement entered on November 18, 2021 delivered by Honourable Lady Justice A Nyukuri against the Defendants, the decree thereto and all consequential proceedings thereto.
 5. That this Honourable Court be pleased to enlarge the time within which the Defendants may file their response to the originating summons dated March 1, 2021.
 6. That the plaintiff be at liberty to file a reply to the defendant's originating summons dated March 1, 2021.



7. That pending the hearing and determination of this suit, an injunction do issue restraining the Plaintiff and her agents, employees, servants and/or otherwise assigns and/or whosoever from attempting to transfer and/or transferring and/or in any manner whatsoever dealing with or interfering with the parcels of land known as Land Ref No 12715/1223 and No 12715/1223 both situate in North West Mavoko Municipality in the Machakos District within the Republic of Kenya.
 8. Any other order that this honourable court may deem fit.
 9. That costs of this application be provided for.
2. The application is based on grounds on its face and supported by the affidavit of Shmina Mandal, the 1st defendant/applicant sworn on January 18, 2021. The applicants' case is that they are the duly registered proprietors of the two suit properties, being Land reference number Mavoko 12715/1223 and Mavoko 12715/1224, and that they only learnt of the instant suit on January 11, 2022, upon being notified by their relatives that a decree dated November 24, 2021, had been sent to their postal address.
 3. They averred that the respondent did not bother to serve any of the pleadings on them and only made efforts to serve the decree by registered mail. They stated that the alleged service by advertisement was improper as the plaintiff did not demonstrate any evidence of the actual service of the notice in their affidavit of service. They further stated that the respondent had not made any application to serve them outside the jurisdiction of this court, being London, United Kingdom, where they reside.
 4. The applicants further averred that the respondent had maliciously failed to serve them with the pleadings, hence denying them participation in the suit, leading to their being granted possession of the suit property by adverse possession. They further pointed out that although the respondent was claiming ownership of both suit properties, she only tendered documents for one of the properties, being land reference number 12715/1223.
 5. It was their case that they have been in possession of the suit properties and had been keen on taking care of the suit property and paying the relevant rates, including visiting the property every often by themselves or their agents. Further that they had sought the services of a Surveyor in 2019 to install beacons on one of the suit properties.
 6. They maintained that the judgment herein was obtained unprocedurally, irregularly, fraudulently and unlawfully. Further, they stated that they were apprehensive that the Respondent would proceed to execute the impugned decree and cause the registration of the suit properties in her favour if the court does not intervene.
 7. The application was opposed. The Respondent filed a replying affidavit sworn by herself on February 10, 2022. It was her case that the Applicants' rights over the suit properties were extinguished lawfully and legally, the Respondent having been declared the owner of the two parcels of land by this court. She averred that the postal address used to serve the decree is the same address used to serve all the other pleadings. She stated that the Applicants remained indolent all that while even upon being served with the pleadings and only took action upon service of the decree.
 8. Further, it was the Respondent's contention that the application had not been properly brought to court, since leave to come on record had not been sought, yet judgement had already been entered. On service, she stated that an excerpt of the newspaper advertisement was annexed to the affidavit of service to that effect. It was her case that substituted service was proper service.



9. She averred that contrary to the Applicants' claims of having possession over the suit property, that it was her who had possession, carried on business and even had a worker who previously worked for her on the suit properties.
10. She reiterated that the impugned judgement was lawfully obtained and that the Applicants were frustrating the execution, hence the application ought to be dismissed.
11. In a rejoinder, the Applicants filed a supplementary affidavit sworn by the 1st Applicant on March 4, 2022. They reiterated the contents of their supporting affidavit and denied the averments in the replying affidavit of the Respondent. In addition, they stated that the Respondents' purported possession of the suit property was not actual, visible, public, exclusive, open and notorious. They stated that service by registered post can only be sanctioned by a court order and that in this case the Respondent did not apply for it, hence the alleged service was not proper. They also stated that there was no record of any such alleged advertisement on the date alleged by the Respondent, and invited the court to take judicial notice of the fact that the alleged advertisement referred to a different matter, not the subject suit.
12. The application was canvassed by written submissions. On record are the Applicants' submissions dated May 16, 2022, and the Respondent's submissions dated May 17, 2022.

Submissions

13. Counsel for the Applicants reiterated the contents of their two affidavits and submitted that this court has unfettered discretion to set aside *ex parte* judgment entered in this matter upon just terms. They buttressed this argument by relying on the cases of *Mbogo & Another VS Shah* (1968) 1EA 93 and *Philip Keipto Chemwolo & another vs Augustine Kubende* (1986)e KLR, which the court has considered.
14. They argued that the Applicants were deserving of the court's discretion, as they had shown that they were the registered proprietors of the suit property and that although the Plaintiff effected service by advertisement, they had no chance of seeing the advertisement as they reside in London.
15. Counsel maintained that the Applicants had demonstrated an arguable defence by demonstrating that they were the registered proprietors of the suit property, that they had at all times followed up on the status of the suit properties by themselves or agents, and that the suit properties were not occupied by anyone including the Plaintiff.
16. On the question of whether the court should enlarge the time within which the Defendants may file their response, they placed reliance on provisions of Order 49 Rule 5 of the *Civil Procedure Rules* and argued that courts have discretion to enlarge time upon such terms as the justice of the case shall require. They cited the Court of Appeal case of *Trust Bank Ltd Vs Amalo Co Ltd* (2003) 1 EA 350 at 352 where the court emphasized the need for disputes to be determined on their merits without unnecessarily deterring litigants from pursuing their rights due to errors.
17. On the issue of whether the court should issue an injunction restraining any dealings over the suit properties against the Plaintiff, the Applicants relied on section 63 of the *Civil Procedure Act* on the granting of a temporary injunction to prevent the ends of justice from being defeated and Order 40 Rule 1 which allows the courts to grant a temporary injunction to restrain the wasting, damaging, alienation, sale and removal of the property as such as the court deems fit until the disposal of the suit or until further orders. They cited the cases of *Mrao Ltd V Fisrt American Bank of Kenya Ltd & 2 Others* (2003) eKLR and *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai* (2018) eKLR which this court has taken into account.



Respondent's Submissions

18. Counsel for the Respondent submitted that the Applicants neither denied knowledge of pleadings herein nor the fact that the postal address used belongs to them. They emphasized that the address used for service of the decree, receipt of which has been admitted by the Applicants, is the same address used for all other pleadings. They cited the case of *National Bank (K) vs Mary Ndeto & Another* (2003) eKLR, where the court upheld service by postal address as proper service.
19. On the process followed during hearing, the Respondent opined that service having been effected, the Applicants simply failed to attend court and judgement was entered regularly on the available evidence. Their position being that the Applicants were indolent and cannot seek the aid of equity. They stated that no leave was obtained to allow counsel for the Applicants to come on record and no notice of appointment was filed by the Applicants' advocates. They also submitted that although they alleged being in possession of the suit property no evidence was given to demonstrate possession.
20. On whether the court ought to grant injunctive orders prayed for, the Respondent stated that the Applicants had only sought for restraining orders over property no Mavoko 12715/1223 and that a party must be bound by their pleadings as held in *Galaxy Paints Company Limited vs Falcon Guards Limited*, CA case No 219 of 1998. They also argued that the draft defence does not raise any triable issues. Their view was that their only duty was to serve the pleadings and that they could not force the Applicants to attend court.

Analysis and Determination

21. I have carefully considered the application, the response thereto and the rival submissions. It is not disputed that an ex parte judgement on this matter was entered on November 16, 2021, declaring the Respondent the lawful owner of the suit properties. It is also not disputed that the Applicants are the registered owners of the suit properties. Therefore, the issues that arise for determination herein are as follows;
 - a. Whether counsel for the Defendants/Applicants required leave to come on record for the Applicants in this matter.
 - b. Whether the Applicants have met the threshold for setting aside an ex parte judgement.
 - c. Whether the application for injunction is merited.
22. The Respondent argued that as the Applicants counsel filed the application herein after entry of judgment, they ought to have obtained leave before coming on record. They also contended that no notice of appointment was filed. The Respondents did not make any reference to any law to support their arguments.
23. While Order 9 Rule 9 of the *Civil Procedure Rules* requires a party who was previously represented by an advocate to seek leave of court to change an advocate, where the new advocate is appointed after entry of judgment, there is no provision requiring such leave where an advocate comes on record for a party who had no advocate previously. In addition, I have perused the record and I note that the Applicants' counsel filed a notice of appointment of advocates on January 19, 2022. In my view, that was sufficient appointment and therefore, I find and hold that counsel for the Applicants is properly on record.



24. The setting aside of ex parte judgment is premised on provisions of Order 10 Rule 11 of the [Civil Procedure Rules, 2010](#), which provides that:

"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."

25. As was held in [CMC Holdings Limited vs Nzioki](#) [2004] 1KLR173, the power of the court to set aside ex parte judgment is discretionary and the court is enjoined to consider the particular circumstances of each case. In that case, the Court of Appeal held as follows;

"In an application for setting aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle..."

The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgment is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues...

The law is now well settled that in an application for setting aside ex parte judgment, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues."

26. It is therefore clear that in considering an application for setting aside ex parte judgment, the court should consider whether service was proper and hence the judgment was regular; and whether the Applicant has an arguable defence.
27. The Respondent argues to have served the Applicants by registered mail since they could not be traced. They further argued that the postal address used is the address on the title documents and that the relatives of the Applicants could have notified them of the pleadings just as they did about the decree. A perusal of the affidavits of service on record indicates that indeed the Respondents did serve various notices by registered mail. In addition, the record shows that on April 13, 2021, the court allowed the Plaintiffs to serve summons by advertisement. This was done vide the Daily Nation newspaper of April 17, 2021, which newspaper is on record. In the instant case, the reasons given by the Applicants as to why they did not file a defence nor attend the hearing of the suit, is lack of proper service upon them. They did annex copies of their passports indicating that they were out of the country during the pendency of the suit. This assertion has not been challenged by the Plaintiff. Having been out of the jurisdiction of this court, it is possible that the Applicants, could not have been aware of these proceedings. Service of pleadings is crucial in any dispute as no one should be condemned unheard.
28. While service by advertisement is proper service, the Applicants have shown that they were outside the jurisdiction of the court as they were residing in London at the time of service. It is clear that being out of Kenya, they could not possibly have seen and or read the Daily Nation newspaper in which service



was effected. In my view therefore, the circumstances of this case point to the fact that service was not proper/sufficient.

29. Besides, the Applicants have stated that they have a defence that raises triable issues. They allege that they are in possession and control of the suit property and that the property is vacant. They also state that they are the ones paying rent and rates and they attached evidence of payment of land rates and photographs of the suit property showing that the same was vacant. They have argued that they have been keen on the status of the suit properties and even appointed a surveyor in 2019 to place beacons on one of the suit properties. In my considered view, as the Plaintiff's claim is based on possession, which possession has been challenged by the Applicants, I find and hold that the Applicants have demonstrated a triable defence.
30. It is a settled principle of law that even where an *ex parte* judgment is regular, demonstration of an arguable defence is sufficient reason for the court to set aside such *ex parte* judgment.
31. On the question of whether the Applicants have met the threshold for grant of temporary injunction, I note that it is incumbent upon them to demonstrate that they have a *prima facie* case with chances of success. The Applicants have not filed their pleadings upon which they can show that they have a *prima facie* case. It is important to note at this stage that a triable defence for purposes of setting aside *ex parte* judgment and a *prima facie* case do not mean one and the same thing. One is an arguable answer or defence and the other is an arguable Counter Claim/Plaint/suit. As the Defendants have not filed a counterclaim upon which an injunction can issue, hence that prayer must fail.
32. The upshot is that the application dated January 10, 2021, is hereby partially allowed as follows;
 - a. *Ex parte* judgement entered on November 18, 2021, against the defendants, the decree thereto and all consequential proceedings thereto, are hereby set aside.
 - b. That this honourable court be and is hereby pleased to enlarge the time within which the defendants may file their response to the originating summons dated March 1, 2021.
 - c. That the Respondents are granted leave to file a reply to the originating summons dated March 1, 2021, within 14 days of this ruling.
 - d. Each party shall bear its own costs of the application.
33. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 9TH DAY OF NOVEMBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Mwaura for the Plaintiff/Respondent.

Ms. Mwaniki holding brief for Mr. Kimathi for the Defendants/Respondents.

Court Assistant - Josephine

