



REPUBLIC OF KENYA



**KENYA LAW**  
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**Murunyu v Murunyu & 2 others (Environment & Land Case  
30 of 2017) [2022] KEELC 15440 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15440 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 30 OF 2017**

**JG KEMEI, J**

**DECEMBER 20, 2022**

**BETWEEN**

**JOSEPH NDUNGU MURUNYU ..... PLAINTIFF**

**AND**

**GEORGE NGUGI MURUNYU ..... 1<sup>ST</sup> DEFENDANT**

**EUNICE MWENDE MURUNYU ..... 2<sup>ND</sup> DEFENDANT**

**BETH WANJIKU KIRIKA ..... 3<sup>RD</sup> DEFENDANT**

***(FORMERLY KERUGOYA ELC NO 44 OF 2016)***

**RULING**

1. The 3<sup>rd</sup> defendant/applicant filed the instant motion seeking orders that;
  - a. The *ex parte* judgment entered on September 29, 2017 by Hon Lady Justice I Gacheru and all subsequent orders thereto be vacated/or set aside.
  - b. The 3<sup>rd</sup> defendant/applicant be allowed to defend this suit as per the annexed statement of defence.
  - c. Costs of the application be provided for.
2. The application is based on the grounds on the face of it and a detailed supporting affidavit of even date sworn by Beth Wanjiku Kirika, the applicant. She averred that she has never been served with any pleadings herein and only learnt about the suit when the plaintiff/respondent filed a replying affidavit annexing copy of the decree herein in Gatundu Succ Cause No 30 of 2011 – Estate of Murunyu Gatonye where the parties herein are all beneficiaries since they are siblings. Copy of the replying affidavit is annexed as BWK1. That accordingly the applicant through her advocates wrote to the Deputy Registrar of this court requesting for copies of pleadings in this case and learnt that the suit



proceeded *ex parte* resulting in the orders issued on September 29, 2017. The applicant avowed that she has a strong defence that raises triable issues as shown by the draft defence – BWK3. She accused the plaintiff of illegally and unprocedurally transferring a portion of land measuring about 0.5ha forming part of land known as Ngenda/Kimunyu/1695 and thus disinheriting the applicant contrary to the copy of certificate of confirmation of grant marked BWK4a. That the respondent's suit was based on his fraudulent acts as Ngenda/Kimunyu/1695 originally belonged to their late father, Murunyu Gatonyu whose estate was solely administered by the respondent.

3. The application is opposed by the respondent/plaintiff, Joseph Ndungu Murunyu who swore his replying affidavit on August 17, 2022. He deposed that all the three defendants were properly served with summons to enter appearance but they failed to enter appearance prompting the respondent's counsel to apply for interlocutory judgment against them. That the court upon being satisfied that the defendants were properly served, set down the matter for formal proof hearing on March 2, 2017 and a decree was issued. That the applicant deliberately refused to enter appearance herein despite being served and her application is an afterthought. The respondent admitted serving the applicant with a replying affidavit in the Gatundu Succession Cause No 30/2011 but pointed out that the applicant has not explained the delay from the time she learnt of this case and when she instructed her advocates to request for pleadings herein.
4. That indeed he was convicted in Gatundu Criminal Case No 169 of 2016 but later acquitted on appeal in Kiambu HCCA No 9 of 2019 whose copy of judgment is annexed as JNM3. The respondent maintained that the applicant is guilty of laches and has come to court with unclean hands and urged the court to dismiss the application with costs.
5. On September 29, 2021 directions were taken and parties agreed to canvass the application by way of written submissions. None of the parties complied with the directions.
6. The germane issue for determination is whether the judgment should be set aside.
7. Order 10 rule 11 of the [Civil Procedure Rules](#) empowers the court to set aside an *ex parte* judgment for default of appearance and defence.
8. Order 12 rule 7 of the [Civil Procedure Rules](#) provides that where under this order Judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just. Further the provision is buttressed by Order 51 rule 15 of the [Civil Procedure Rules](#) which provides that the court may set aside an order made *ex parte*.
9. The court's power to set aside judgments is discretionary and must be exercised judiciously. The Court of Appeal in the celebrated case of *Shah v Mbogo and Another* [1967] EA 116 held that:

“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.”
10. In instances where the court is satisfied that proper service was not effected upon a defendant, then judgment would be set aside as a matter of right. This position is affirmed by the Court of Appeal in the case of *Pitbon Waweru Maina v Thuka Mugiria* [1983] eKLR.



11. The Court of Appeal in the case of *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another* [2016] eKLR observed thus;

“... From the outset, it cannot be gainsaid that a distinction has always existed between a default Judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the *Civil Procedure Rules*, to move the court to set aside the default Judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default Judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other ...”

12. The gist of the application is non-service of the court pleadings on the applicant to accord her a chance to be heard during the trial. A perusal of the court record reveals that *vide* two affidavits of service sworn on April 26, 2016 and June 9, 2016 by David Kihaya Muraya all the defendants were personally served by the process server in the company of the plaintiff who identified them. That the 1<sup>st</sup> and 3<sup>rd</sup> defendants acknowledged service of the pleadings by signing copies of the documents but the 2<sup>nd</sup> defendant declined to sign. However, the two affidavits do not contain the duly served copies of pleadings to that end as deponed. It is trite that once a defendant alleges non-service of pleadings, the burden to prove otherwise rests upon the plaintiff. In this case the plaintiff has not fully discharged the said burden.
13. Ultimately, I find that the default judgment entered against the 3<sup>rd</sup> defendant was irregular for want of proper service of the pleadings upon him.
14. In the end the application is allowed as follows;
- a. The judgement entered on the September 29, 2017 be and is hereby set aside and or vacated.
  - b. The 3<sup>rd</sup> defendant be allowed to defend this suit as per the annexed statement of defense.
  - c. The 3<sup>rd</sup> defendant to file and serve the defense within 7 days from this ruling and thereafter parties to fix a pretrial conference in preparation of the hearing.
  - d. Costs shall be in the cause.
15. Orders accordingly

**DELIVERED, DATED AND SIGNED AT THIKA THIS 20<sup>TH</sup> DAY OF DECEMBER, 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Mbiyu for Plaintiff/Respondent

1<sup>st</sup> and 2<sup>nd</sup> Defendants – Absent



Wanjiru Njehia HB Kamonjo for 3<sup>rd</sup> Defendant

Court Assistant – Phyllis / Kevin

