



**Iningu v Mwangi (Environment & Land Miscellaneous Case  
9 of 2023) [2024] KEELC 3761 (KLR) (8 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3761 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND MISCELLANEOUS CASE 9 OF 2023**

**M SILA, J**

**MAY 8, 2024**

**BETWEEN**

**BENJAMIN ININGU ..... APPLICANT**

**AND**

**ANNE MUTHONI MWANGI ..... RESPONDENT**

**RULING**

(Application to set aside ex parte proceedings on basis that the applicant was not served; affidavit of service filed purporting that applicant was served but applicant providing evidence that she was out of the country at the time; clear to court that applicant was not within the country and could not have been served as alleged; application allowed and all consequential orders set aside)

1. What is before me is an application dated 23 February 2022 filed by the respondent to this Miscellaneous Suit. I will refer to her as the applicant in this ruling. Prayer (i) is spent as it merely sought that the application be certified urgent. Prayer (ii) is to have the law firm of Mungai Kamau & Company Advocates be allowed to come on record in the matter as representing the applicant which prayer has no issue and is allowed. The substantive prayer is prayer (iii) which seeks to set aside the decree and judgment of this court entered on 5 October 2010 and all consequential orders issued thereon. The main ground upon which the application is based is that the applicant was never served with the Miscellaneous Application dated 16 September 2010 since she was out of the country on 23 September 2010 when the process server alleged to have served her. The application is opposed.
2. To put matters into context the respondent (as applicant) commenced the proceedings herein through a Miscellaneous Notice of Motion dated 16 September 2010 and filed on 17 September 2010. The respondent asked for orders to have the sale of the property Kwale/Diani Complex /919 sold to him by Pave Auctioneers on 29 December 2009 in execution of warrants of attachment issued in Migori CMCC No. 560 of 2002, be upheld by this court, on the basis that the sale was proper and that the judgment debtor had disowned the purported transfer of the property to the applicant. It was also



- said that the purported transfer of the property to the applicant occurred after the court had issued a prohibitory order against the suit property which was served upon the Land Registrar, Kwale, on 12 July 2005. The respondent sought orders to have the District Land Registrar, Kwale, cancel the transfer of the property to the applicant and have the property registered to him.
3. The motion came before Makhandia J (as he then was) on 5 October 2010 for inter partes hearing. Present was counsel for the respondent (as applicant therein) and there was no representation on behalf of the applicant herein (as respondent). The court was informed that the applicant had been served and that there was an affidavit of service on record. The court was persuaded by the affidavit of service and allowed the application as prayed. The matter was therefore concluded on that basis.
  4. In this application the applicant contends that she was never served as claimed by the respondent. I have seen the impugned affidavit of service. It is an affidavit sworn by one Isaac Nyangena Kemari. It avers that on 23 September 2010 in the company of the applicant therein (now respondent) they proceeded to Molo Town to serve the respondent (now applicant). It continues to state that they located the applicant in her shop called Molo Groceries located opposite Kenya National Cereals and Produce Board where she was attending to customers. She was then served at 4.30 pm and she accepted service by signing at the back. In her supporting affidavit, the applicant avers that she was in Germany at the time and she has annexed copies of her passport to show that she exited the country on 10 July 2010. She avers that she got registered as proprietor of the suit land on 21 April 2009, put up a perimeter wall, a borehole, and a caretaker's house and has since enjoyed uninterrupted possession. She found out that the respondent was now registered as proprietor when she went to visit the Land Registry in May 2021. She avers that she has discovered that the respondent proceeded to cause sale of the suit land in execution of a decree passed in Migori CMCC No. 560 of 2002 where he had sued United Insurance Company. She avers that on 2 July 2019, the respondent filed an application in that Migori suit asking for orders to be vested with the land parcel Kwale/Diani Complex/532 on the grounds that the earlier orders erroneously listed the wrong property which is the suit land. She has annexed a copy of the said application. She states that the application was allowed but the earlier vesting order of the suit property was not cancelled for having been issued in error.
  5. The respondent filed a replying affidavit to oppose the motion. He avers that subsequent to the decree in Migori CMCC No. 560 of 2002, Duncan Majiwa vs United Insurance Company Limited, the decree holder commenced execution proceedings and the judgment debtor's parcels of land were identified. He avers that among the properties identified as registered in name of United Insurance Company Limited was Kwale/Diani Complex/919 (the suit land). He avers that the property was advertised in the newspaper of 15 December 2009 and auction was conducted on 29 December 2009 by Pave Auctioneers. He was the highest bidder at Kshs. 600,000/= and the property was then transferred to him. When he presented his documents he was informed that the suit land is registered in name of Anne Muthoni Mwangi, the applicant herein. He investigated and the Receiver Manager, United Insurance, told him that he was not aware of the transfer of the property from United Insurance to the applicant and that there had earlier been a prohibitory order registered against the title. He avers that he then filed the Miscellaneous Application for cancellation of the applicant's name in the title. He contends that the applicant was duly served and allowed. He is now the registered proprietor.
  6. I have considered the application. I do not think that the assertion of the applicant, that she was not in the country at the alleged time of service has been seriously contested. There is clear evidence that the applicant was not in the country when the application is purported to have been served upon her. That alone entitles the applicant to an order to set aside the ex parte proceedings of 5 October 2010 ex debito justitiae (as a matter of right). I am aware that the respondent claims that the applicant obtained registration of the suit land through fraud. That is an issue that I cannot go into at this stage of the



proceedings. All I need to satisfy myself at this level is whether or not the applicant was served as claimed and I have found that she was not served. That affidavit of service was nothing but a fraud.

7. I am also aware that in his submissions, Mr. Kisia, learned counsel for the respondent urged that the application is out of time and referred to Section 4 (4) of the Limitation of Actions Act, Cap 22, Laws of Kenya. It provides as follows :-

(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

8. Counsel argued that the judgment in Migori CMCC No. 560 of 2002 was delivered in the year 2005 and orders of rectification were issued on 5 October 2010. He claimed that the application is time barred because six years have lapsed. There is no substance in the above argument. The important date is 5 October 2010. This application was filed on 23 March 2022. The simple answer to Mr. Kisia is that 12 years had not lapsed and this application is therefore within time. Even then, time would not run against the applicant, pursuant to Section 26 of the Limitation of Actions Act, until she discovered the fraud which was discovered in the year 2021. This application is well within time and I have found that it is fully merited.

9. I therefore proceed to set aside the ex parte proceedings and order issued on 5 October 2010. Having done that it follows that all consequential orders and steps undertaken pursuant to the order of 5 October 2010 have to be set aside and that includes any registration of all dispositions in the register of the land parcel Kwale/Diani Complex/919 after 5 October 2010. I hereby issue an order to the Land Registrar Kwale, to cancel all entries made in the register of the land parcel Kwale/Diani Complex/919 after 5 October 2010 and revert the register to the manner that it was as at 5 October 2010. The applicant will have costs of this application as it is clear that a false affidavit of service was used by the respondent to purport that she was served when she was not.

10. I will give further directions on the inter partes hearing of the Miscellaneous Notice of Motion dated 16 September 2010 after delivery of this ruling.

11. Orders accordingly.

**DATED AND DELIVERED THIS 8 DAY OF MAY 2024**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

**Delivered in the presence of :**

**Mr. Mungai Kamau for the applicant**

**No Appearance on the part of Mr. Kisia for the respondent**

**Court Assistant – David Ochieng'**

