



**Murithi v Muketha & 2 others (Environment and Land Appeal
E068 of 2022) [2024] KEELC 3791 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3791 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E068 OF 2022**

**CK NZILI, J
MAY 8, 2024**

BETWEEN

PHYLIS NGETA MURITHI APPELLANT

AND

ELIZABETH KARAMBU MUKETHA 1ST RESPONDENT

MARIA KATHURE JOSEPH 2ND RESPONDENT

NAOMI RUGURU IGWETA 3RD RESPONDENT

*(Being an appeal from the ruling of Hon. T.M Mwangi – (SPM)
delivered on 27.10.2022 in EMC ELC Case No. 20 of 2019)*

JUDGMENT

1. The suit at the trial court commenced with a plaint dated 18.2.2019, where the appellant, together with the 3rd respondent, had been sued by the 1st and 2nd respondents for breach of trust regarding L.R No. Timau/Timau Block 7 Nkando/621 said to be held in trust. The 1st and 2nd respondents had sought a declaration of the suit land as held in trust, subdivision into four equal shares in favor of each of them vacant possession and a permanent injunction. The 3rd respondent made a statement of admission of the claim dated 13.3.2019, that she and the appellant were indeed given the suit land by their late father, the late M'Muriki Manyara, to hold in trust for themselves and the 1st and 2nd respondents in equal shares and averred that the 1st and 2nd respondents claim was well founded both in fact and the law. The development triggered an application dated 14.4.2019 for entry of judgment on admission by the 1st & 2nd respondents.
2. As to the appellant's summons to enter appearance and hearing notices on 26.2.2019 and an affidavit of service filed by Joseph Kithinji M'Kiambati on 12.3.2019 and 30.4.2019, 16.7.2019. By a ruling dated 13.6.2019, the trial court declined to enter judgment on admission and ordered that the matter



proceed in the usual manner. Having been satisfied that the appellant was duly served with hearing notices, the matter commenced hearing on 16.7.2019, where the 1st and 2nd respondents called four witnesses and closed their case, and the 2nd respondent testified as P.W. 1.

3. The 1st and 2nd respondents relied on a copy of the record as P. Exh No. (1), affidavit of service by Joseph Kithinji M'Kiambati dated 28.5.2018 as P. Exh No. (3) and a demand letter dated 14.3.2018 as P. Exh No. (2).
4. The trial court proceeded to deliver its judgment on 8.8.2019, allowing the 1st and 2nd respondent claims.
5. By an application filed on 31.1.2022, the appellant sought to stay the executions of the decree and to set aside the *ex parte* judgment and all the consequent orders. In the supporting affidavit dated 31.7.2012, she made an admission that the 1st respondent was her biological mother, who left their father in 1969 and remarried in Ruiru. The appellant averred that she acquired an interest in the land together with the 3rd respondent directly from their late father, as per the attached declaration attached as PNM "1 (a) and (b)", and took vacant possession in 2000, following which she obtained a title deed attached as PNM "2".
6. The appellant averred that in 2016, parties were summoned by the area chief over the issue, and the 1st and 2nd respondents were unable to sustain their claim. She attached a copy of the letter dated 13.12.2016 as PNM "3".
7. The appellant termed the affidavit of service by Joseph Kithinji Kiambati as false, a sham and misleading, whom she wished to cross-examine at the hearing of her application.
8. As a co-owner of the suit land, the appellant averred it would be prejudicial to be condemned unheard and for the execution to proceed as it had done by dividing the land into portions. The appellant attached a copy of the search dated 26.1.2022 as annexure PNM "4".
9. The 2nd respondent opposed the application by a replying affidavit sworn on 28.3.2022, saying that there was proper service of summons upon the appellants on account of summons to enter appearance the application for judgment on admissions hearing notice for 16.7.2019 and later on with a decree.
10. Further, the 2nd respondent averred that the title register had been closed for subdivisions as shown in the copy of an official search, and since the appellant ignored the suit, there was no good reason to set aside or stay the execution, especially when the application was being filed 27 months after the entry of judgment.
11. The 2nd respondent averred that the appellant had annexed no draft defense to her application; hence, no case with merits had been disclosed to warrant the exercise of the court's discretion. The 2nd respondent urged the court to consider all the facts and circumstances, both prior and subsequent merits of the parties, and find the application lacking merits.
12. By a further affidavit dated 10.5.2022, the appellant denied the alleged service with court process or willful failure to defend herself. The appellant averred she learned of the suit after obtaining information on the subdivision, which was confirmed by the official search, and that all her annexures were clear that she has a genuine claim to the suit land, which should justify the orders sought. She blamed the short notice and the urgency to apply for a stay of execution for not attaching the draft defence.
13. The record shows that the process server filed an affidavit sworn on 13.7.2022 confirming that the appellant had been duly served with all the court processes through the assistance of the 1st respondent,



- a sister to her on 21.1.2019, 26.2.2019, 26.4.2019, 25.6.2019 and 3.10.2019. There is no indication if the respondent was served with the application even though an affidavit of service was ordered to be filed by 6.6.2022. Additionally, also there is no indication if the judgment notice was served upon the appellant yet there was an order to that effect. By a ruling dated 27.10.2022, the trial court dismissed the application dated 31.1.2022, paving the way for this appeal.
14. The appellant faults the trial court for condemning her unheard, for finding the no-attachment of the draft defence to the application and for failing to apply the oxygen rule requiring just and proportionate resolution of disputes based on fair hearing.
 15. The appeal was canvassed by way of written submissions dated 13.3.2024 and 14.3.2024. The appellant submitted that the service of the court processes was contested yet the process server was not availed on account of death. Therefore, the appellant submitted on that account alone that the application should have been allowed. The appellant submitted that there was enough evidence that the suit land was a gift *inter vivos* and she should not have been knocked out of the seat of justice, contrary to the principles of natural justice. Reliance was placed on *David Oloo Onyango vs AG* (1987) eKLR and *Kiai Mbaki & others vs Gichuhi Macharia & another* (2005) eKLR.
 16. The respondents submitted that the appellant should not be hard to say that she was condemned unheard for there was proper and adequate service with the court processes and that under Order 5 Rule 16 *Civil Procedure Rules*, the application to cross-examine the process server was not advanced. That notwithstanding, the respondents submitted that the affidavit, evidence by the process server who had passed on, was proper and admissible evidence in law. Reliance was placed on *Paul Odidi vs Abdul Hakim Abeid & 2 others* (2021) eKLR.
 17. Regarding triable issues, the respondents submitted that the non-inclusion of the draft defense twice was fatal and that it was not enough to file a replying affidavit without such a draft statement defense. Reliance was placed on *Xplico Insurance Co. vs Purity Wawira Daviest* (2021) eKLR, which cited the approval of *Equatorial Commercial Bank Ltd vs Engineering Works Ltd & others* (2014) eKLR.
 18. An appellate court of the first instance is obligated to reappraise itself on the lower court record and come up with independent findings as to facts and the law. See *Gitobu Imanyara & others vs A.G. & others* (2013) eKLR.
 19. The single issue for my determination in this appeal is whether the trial court in refusing to set aside or stay the decree, exercised its discretion judiciously and based on sound legal principles. In *Mbogo & another vs Shah* (1968) E. A the court held that an appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court, in exercising its discretion, misdirected itself in some matters and, as a result, arrived at an erroneous decision or unless it is manifest from the case as a whole that the court has been wrong in the exercise of judicial discretion and that as a result there has been mis-justice.
 20. In *Patel vs E.A Cargo Handling Services Ltd* (1974) E. A 75, the court observed that there were no limits or restrictions to a judge's discretion except that if he does vary the judgment, he had to do so on such terms as are just. In *Shanzu Investment Ltd vs Commissioner of Land* (1993) eKLR, the court held that the jurisdiction to vary judgment should be excised judicially based on the facts of each case and that the tests are whether there was a defense on merits, any prejudice to be occasioned and the explanation for the delay.
 21. In *Five Forty Aviation Ltd vs Tradewinds Aviation Service Ltd* (2015) eKLR, the court said a triable issue does not mean one that will succeed but one disclosing a triable issue or a prima facie defense, which should go to trial for adjudication. In *James Kanyita Nderitu & another vs. Marios Philotas*



- Ghikas & another* (2016) eKLR, the court said that the court, in setting aside a judgment, looks into the reason for non-attendance, length of time that has elapsed since the judgment in default, whether the intended defense raises triable issues, the prejudice likely to be caused to each party and whether on the whole, it is in the interest of justice to set aside the judgment. The court cited with approval *Sangram Singh vs Election Tribunal Koteh A/R* (1955) SC 664 at 711, that natural justice requires that men should not be condemned unheard, especially in proceedings affecting their lives and property.
22. In this appeal, the issue of service of court processes was not contested. There was affidavit evidence of the process server before he passed on during the pendency of the application. The appellant submitted that she should have been given the benefit of the doubt. Unfortunately, the contents of the affidavit evidence were not challenged by any of the rival affidavits that the appellant was not a sister of the person alleged to have guided the process server during the visits to effect service. The appellant did not state that she was not at home during the visits indicated by the process server. In my considered view, I find that there was no evidence to the contrary that the affidavits of service were false, misleading, and unbelievable.
 23. Coming to whether the appellant had raised a triable issue and if the only way to demonstrate so was through a draft defense, there is no dispute that the appellant raised several issues regarding the source, circumstances, nature of occupation, and justification of her entitlement to the suit land. None of the respondents had disputed paragraphs 2, 3, 4, 5 & 6 of the supporting affidavit dated 31.1.2022 and the annexures thereto. The replying affidavit sworn on 28.3.2022 by Maria Kathure Joseph solely addressed the question of the service of the court processes.
 24. Naomi Ruguru Igweta, the 3rd respondent herein and a co-owner of the suit land, did not deny the pertinent issues raised by the appellant in the affidavits. In *John Kiboch vs National Media* (2015) eKLR, a trial re-issue was said as one which need not succeed but one requiring to be put on trial for adjudication. The appellant had raised what, in my view, are valid grounds to defend the suit, which the respondents did not dispute. There is no bar in law that a triable issue cannot be raised by way of an affidavit.
 25. Other than saying that the title had been closed for subdivisions, there was no evidence of any prejudice to the respondents which could be more than the prejudice the appellant will suffer by being condemned unheard. There was no evidence that the appellant was negligent, reckless, or out to obstruct or derail the cause of justice.
 26. In *Henry Orina Okao vs Timothy Ogucha Omato* (2014) eKLR, the court said that the plaintiff had failed to state what prejudice or injury he would suffer if the orders sought were granted that cannot be compensated by way of costs. Further, the court said that there were no suggestions that a fair hearing would not be possible if the judgment entered were set aside.
 27. Having looked at the ruling dated 27.10.2022, I think the law and practice are that a party has several options to demonstrate triable issues otherwise than through a draft statement of defense. In this appeal, the appellant went to the extent of attaching documentary evidence she would use to sustain her defense if given a chance.
 28. The trial court failed to consider other factors and principles, as alluded to in the cited caselaw above on the exercise of discretion on whether or not to set aside a final judgment and a decree. The upshot is that I find the appeal with merits. The same is allowed. Costs of the appeal to the appellant.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 8TH DAY OF MAY, 2024



In presence of
C.A Kananu
Kerubo for respondent
HON. C K NZILI
JUDGE

