



**Mungai v Marangu (Environment and Land Appeal E010 of 2023)
[2024] KEELC 3831 (KLR) (7 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3831 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL E010 OF 2023**

AK BOR, J

MAY 7, 2024

BETWEEN

JOSEPHAT MUNGAI APPELLANT

AND

LUCY GATWIRI MARANGU RESPONDENT

JUDGMENT

1. This appeal is against the judgment of the Learned Chief Magistrate, Hon. A. R. Kithinji delivered on 8/2/2023 in Nanyuki CMC ELC Case no E055 of 2022 vide which the Learned Magistrate issued an order for the eviction of the Appellant from the land known as Nanyuki Municipality Block 1/272 (“the suit land”). The eviction was to be effected by the Officer Commanding Nanyuki Police Station and the Respondent was awarded costs. The judgment followed the trial of the case which proceeded without the Appellant’s participation.
2. The Appellant filed the application dated 9/2/2023 before the trial court seeking to have the judgment and decree set aside and for the suit to be struck out with costs. The application was premised on Section 152E of the Land Act on the requirement to give three months’ notice before the intended eviction. The Appellant contended that the law on eviction was not complied with and that his right to be heard and to a fair trial had been contravened. The Learned Magistrate heard the application and through the ruling of 24/5/2023, dismissed it.
3. The Learned Magistrate found that the Appellant had been served with summons to enter appearance at his place of business known as Alphabest Computers and ICT Solution at Nanyuki as indicated in the affidavit of service sworn on 21/12/2022. The court noted that the Appellant had not denied ownership of that business and he had failed to prove that he was not served with the pleadings and the summons to enter appearance.



4. The court went on to observe that the record showed that the Respondent bought the suit land through a public auction and was registered as the proprietor, as shown by the copy of title which she tendered in evidence. She moved the court after the Appellant failed to vacate the suit land and the trial court found that she had proved her case to the required standard.
5. The grounds of appeal set out in the Memorandum of Appeal filed in court on 22/6/2023 can be summarised as follows: that the Learned Magistrate erred in holding that the Appellant had failed to discharge the burden of proof; that he failed to take into account the essential ingredients to be considered when setting aside an irregular ex parte judgment and that the Appellant was therefore condemned unheard. He also faulted the Learned Magistrate for holding that he was properly and lawfully evicted which in the Appellant's view was contrary to Sections 65 and 67 of the Regulations of the Land Act and Section 152E of the Land Act.
6. This court directed parties to file and exchange submissions on the appeal, which it has duly considered. The Appellant submitted that the Learned Magistrate entered interlocutory judgment on 5/1/2023 pursuant to the affidavit of service deponing that the Appellant was served at Alphabest Computer and ICT solutions Nanyuki. The Appellant contended that the averments in the affidavit of service showed that what was served was the business premises known as Alphabest Computer and ICT Solutions Nanyuki and that no proper service as required by Order 5 of the Civil Procedure Rules was effected. He also took up the issue that there was no affidavit of service to confirm that the email was sent to him. He added that there was no evidence to show that the notice of interlocutory judgment, hearing notice, decree and notice of eviction were served on him before the case proceeded for formal proof before the trial court.
7. The Appellant maintained that the judgment he seeks to set aside was irregularly entered without proper service and further, that a notice of eviction contemplated by Land Regulations 65 and 67 and Section 152E of the Land Act of 2016 was not served. He maintained that he was condemned unheard contrary to Article 50 (1) of the Constitution and that the court failed to take into account the essential tenets to be considered in setting aside an irregular interlocutory judgment.
8. The Appellant cited the requirement under Section 152 E of the Land Act and the manner in which the eviction notice was to be served in urging the court to allow his appeal. The Appellant relied on the decision in Kennon Mwiti Mbae (suing as the legal representative of the estate of Silas Judah Mbae Deceased) v Zaverio Kiamba & 4 Others: Festus Riungu Rimbeira (intended interested Party) [2019] eKLR on the point that interlocutory judgment ought not to be entered in land matters. He also relied on Atik Mohammed Omar Atik & 3 Others v Joseph Katana & another [2019] eKLR on the steps to be taken in an eviction, including requiring the lawful owner to serve a notice of eviction in accordance with the law to give the affected persons an opportunity to seek relief in court.
9. On his part, the Respondent submitted that the Appellant was made aware of the suit facing him but that he intentionally decided to remain indolent, ignorant and in laxity. She adverted to the observation by the Learned Magistrate regarding where and when service was effected. Further, that the trial court noted that the Appellant had not denied ownership of the business premises where he was served by the process server hence it cannot be said that he was condemned unheard when he squandered the opportunity afforded to him.
10. The Respondent submitted that faced with an application to set aside judgment, the court had an unfettered jurisdiction to determine whether or not to set aside the judgment and in so doing takes into account the reason for failure to file a defence; the time that had elapsed since the judgment was entered; whether the intended defence raised triable issues; and, the prejudice each party was likely to suffer and whether on the whole it was in the interest of justice to set aside the judgment. The Respondent



emphasised that the judgment in this instant was regularly entered because the Appellant was properly served. The Respondent surmised that the Appellant did not attach any defence which would show some triable issue and that in any case she was the registered owner of the suit land.

11. The Respondent added that the Appellant voluntarily left the suit land upon service of the judgment and that she took possession of the land. She went on to add that she had proved that she bought the suit land at an auction and paid the consideration of ksh 3,400, 000/= following which she was obtained consent and a title deed processed. She urged the court to allow her to enjoy the fruits of her judgment and relied on *Moses Kimaiyo Kipsang v Geoffrey Kiprotich Kirui* [2022] eKLR on the distinction between a default judgment that was regularly entered, and one entered irregularly. The court noted that the applicant had failed to file a skeleton defence to demonstrate what kind of defence they would be raising.
12. The issue for determination is whether the court should allow the appeal and set aside the ruling of the Learned Magistrate delivered on 24/5/2023 so that the Appellant can file a defence and the suit is heard afresh. The background to this case which was not controverted by the Appellant, is that the Respondent bought the suit land at an auction, obtained a title over the land and filed the suit to evict the Appellant after he failed to vacate the suit land. The Appellant did not attach a draft defence to show what defence he would be filing if the court were to set aside the judgment and allow him to defend the suit. There is no mention of the Appellant challenging the auction of the suit land. The inference to be drawn from this is that the Appellant had notice and was well aware that his land had been sold at a public auction and that sooner or later the new owner would be seeking possession of the land purchased at the auction.
13. The Appellant took issue with the entry of interlocutory judgment in the suit yet this was a claim for the recovery of land. In this court's view, nothing much turns on this point since it is evident from the proceedings that the case went for trial and the Respondent adduced evidence which the trial court based its judgment on.
14. The Appellant contended that he was not served with three months' notice of eviction as the *Land Act* stipulates. His submission was that according to the affidavit of service which the trial court went by, it was the business premises known as Alphabest Computer and ICT Solutions Nanyuki that was served. He did not deny knowledge of those premises or that he was somewhat connected to those business premises.
15. Looking at the affidavit of service filed by Geoffrey Mburugu M'Mukiiri deponing to the manner in which he served summons and other court documents upon the Appellant on 9/12/2022, the court is not satisfied that the Learned Magistrate misdirected himself when he found that proper service of summons and court papers was effected on the Appellant.
16. The assertion by the Respondent that the Appellant voluntarily left the suit land after the judgment was served on him and that she took possession of the suit land was not controverted. The court is not satisfied that granting the orders sought in the appeal will serve any useful purpose.
17. The appeal lacks merit and is dismissed with costs to the Respondent.

DELIVERED VIRTUALLY FROM NAIROBI THIS 7TH DAY OF MAY 2024.

K. BOR

JUDGE

In the presence of:

Mr. Amos Chweya for the Appellant



Court Assistant- Ms. Stella Gakii

No appearance for the Respondent

