



REPUBLIC OF KENYA



**KENYA LAW**  
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**Scott & another v Karanja & 4 others (Environment & Land Case 003 of 2024)  
[2024] KEELC 7361 (KLR) (Environment and Land) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7361 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA**  
**ENVIRONMENT AND LAND**  
**ENVIRONMENT & LAND CASE 003 OF 2024**  
**MC OUNDO, J**  
**NOVEMBER 7, 2024**  
**(FORMERLY NAKURU ELC 419 OF 2017)**

**BETWEEN**

**LEON SCOTT ..... 1<sup>ST</sup> PLAINTIFF**

**VERWRAY SCOTT ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ESTHER KARURU KARANJA ..... 1<sup>ST</sup> DEFENDANT**

**STEPHEN NJENGA NJUGUNA ..... 2<sup>ND</sup> DEFENDANT**

**JONATHAN MAINA KIHARA ..... 3<sup>RD</sup> DEFENDANT**

**PETERSON MUCHIRI GACHARI ..... 4<sup>TH</sup> DEFENDANT**

**GEOFFREY KARANJA MBOA ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. What is before me for determination is a Notice of Motion Application dated 23<sup>rd</sup> April, 2024 brought by the 2<sup>nd</sup> to 5<sup>th</sup> Applicants herein and pursuant to the provisions of Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, IB, 3 and 3A respectively of the *Civil Procedure Act*, Articles 20, 25, 48, 50, 159 and 259 of the *Constitution* of Kenya, 2010 and all enabling provisions of law wherein they seek orders that the judgement delivered on 28<sup>th</sup> July, 2023 together with the decree and any other consequential orders arising be set aside. The Applicants also seek orders that the hearing proceedings of 24<sup>th</sup> April, 2023 to be set aside so that the suit can be heard de novo and on priority basis. That they be granted leave to file their Defences wherein the draft Defence herein filed be deemed as properly filed. Lastly they seek for the costs of the Application.



2. The Application was supported by the grounds therein and a Supporting Affidavit of an even date sworn by Peterson Muchiri Gachari, the 4<sup>th</sup> Applicant herein, who deponed that neither he nor the 2<sup>nd</sup>, 3<sup>rd</sup> or 5<sup>th</sup> Applicants had been served with summons to enter appearance or any court document in that matter because service had been effected through the Nation Newspaper which they never saw.
3. That he had only learnt of the case facing them after upon stumbling on a ruling dated 28<sup>th</sup> July 2023 whereupon instructing Counsel, it had been revealed to them that that the case had proceeded to conclusion ex-parte wherein judgement had been delivered on 28<sup>th</sup> July, 2023.
4. That had they been served and/or notified of a pending case, they would have filed a Defence and strenuously defended the instant claim since they had a strong and good Defence as herein annexed vide their Draft Defence.
5. That in the year 2015, the 1<sup>st</sup> Defendant, a duly authorized and holder of a Power of Attorney and Agent for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein had sold to them LR No. Naivasha/Maraigushu Block 18/398 (Naivasha Unity) and Naivasha/Maraigushu Block 18/406 (suit properties) wherein after the suit properties had been transferred to them, they had subdivided land parcel No. Naivasha/Maraigushu 18/406 into 4 parcels resulting into Naivasha/ Maraigushu 18/1814, 1815, 1816 and 1817. Each one of them obtained a title deed to their respective portion. That they were therefore bonafide purchasers of the land for a consideration.
6. That with this in mind and in the interest of justice, the judgement entered against them on 28<sup>th</sup> July, 2023 and all proceedings ought to be set aside and they be granted leave to file their Defence and defend themselves in the instant case.
7. In response and opposition thereto, the Respondents vide a Replying Affidavit dated 17<sup>th</sup> May, 2024 sworn by Leon Clinsee Scott, the 1<sup>st</sup> Respondent herein deponed that the Application had been brought in bad faith, was an abuse of the court process and intended to deny him the fruits of judgement delivered on 28<sup>th</sup> July, 2023. That whereas the Applicants had been aware of the existence of the suit against them for a considerable period of time, they had refused and/or neglected to come forth and defend themselves.
8. That because they had frustrated all the efforts to have them served by evading service by the process server, his Advocate, being desirous of having the instant matter heard on merit had on 22<sup>nd</sup> November, 2017 sought for and had been granted the order to serve them through substituted service which was done through the print media being the Daily Nation of 24<sup>th</sup> November, 2017.
9. That despite service, the Applicants had failed to file any Defence and/or appear to defend themselves. Through the court's direction, service for hearing for the 26<sup>th</sup> March, 2019, was again effected through their email address, WhatsApp and/or their last known addresses as per an Affidavit of Service dated 27<sup>th</sup> June, 2019.
10. That subsequently, the Applicants being aware of the existence of the instant suit and the lodging of a caution at Naivasha land registry, had removed the same and fraudulently transferred the parcels of land to themselves at a time when the purported Power of Attorney held by the 1<sup>st</sup> Defendant had not been valid for purposes of registration of the suit properties. He thus prayed that the 2<sup>nd</sup> to 5<sup>th</sup> Applicants' Notice of Motion Application dated 23<sup>rd</sup> April, 2024 be dismissed with costs for lacking merit.
11. In a rejoinder, the 2<sup>nd</sup> to 5<sup>th</sup> Applicants reiterated that they had not been aware of the existence of the instant suit until the year 2024 when the 4<sup>th</sup> Applicant had informed them upon coming across a ruling on the internet. That whereas the 2<sup>nd</sup> Applicant lived in Norway, yet her home in Naivasha was next to



Block 18/398 thus it would have been very easy for the Respondents to serve her had they wanted to. The 2<sup>nd</sup> Applicant maintained that they never evaded service of sermons and denied ever being served through email. That further, she was not aware of any caution that had been registered against the suit properties. She contended that the 1<sup>st</sup> Defendant had a duly registered power of attorney to sell the suit property and therefore his actions were binding. That had he not paid the Respondents, then that was a dispute between the donor and the donee which the 2<sup>nd</sup> to 5<sup>th</sup> Applicants should not be dragged into. She thus prayed that the judgement herein be set aside and they be allowed to defend the present suit.

12. The 1<sup>st</sup> Defendant did not participate in the instant Application.
13. Directions to have the Application canvassed by way of written submissions were only complied with by the 2<sup>nd</sup> to 5<sup>th</sup> Applicants wherein they had framed their issues for determination as follows:
  - i. Whether proper service was effected by the Respondents upon the 2<sup>nd</sup> to 5<sup>th</sup> Applicants.
  - ii. Whether the court should set aside the ex-parte judgement delivered on 28<sup>th</sup> July, 2023.
14. On the first issue for determination as to whether proper service was effected by the Respondents upon the 2<sup>nd</sup> to 5<sup>th</sup> Applicants, reliance was placed on the provisions of Section 20 of the *Civil Procedure Act*, Order 5 Rule 8 of the Civil Procedure Rules and the decided case of Brenda Karanja v Mweki Dominic [2021] eKLR where the court had cited the case of Lee Mwathi Kimani v National Social Security Fund & another [2014] eKLR to submit that there had been no proof of service through either email, the last known addresses or WhatsApp, hence the Respondents' assertion that they had been served was in bad faith and an attempt to deny them their constitutional rights and deprive them their hard-earned property through an ex-parte judgement dated 28<sup>th</sup> July 2023 and the decree issued on 13<sup>th</sup> October, 2023.
15. Their assertion was that personal service remained the best mode of service despite the Civil Procedure Rules, 2010 providing for substituted service. They placed reliance on the decision in the case of Philip Mutiso Mulalya v Samuel Dominic Muathe & 2 others [2022] eKLR to emphasize that substituted service was an alternative only where personal service was not possible. No evidence had been demonstrated by the Respondents' process server on how personal service had become futile despite several attempts.
16. On the second issue for determination as to whether the court should set aside the ex-parte judgement delivered on 28<sup>th</sup> July, 2023, they placed reliance on the provisions of Order 10 Rule 11 of the Civil Procedure Rules and the decision in the case of James Kanyita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR to submit that there ought to be distinction between an irregular and regular judgement before deciding whether or not to set aside an ex-parte judgement. That the impugned judgement of the 28<sup>th</sup> July, 2023 had been a regular one for reason that an order for service upon them through substituted service had been made and effected on 24<sup>th</sup> November, 2017 in the Daily Nation newspaper, which they had not read.
17. That subsequently, the judgement herein being regular, whether or not to set it aside was a matter of court's discretion as was held in the case of David Kiptanui Yego & 134 others v Benjamin Rono & 3 others [2021] eKLR where the court had cited the case of Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd vs Augustine Kubede (1982-1988) KAR.
18. They reiterated that the service by the Respondents upon them had not been proper therefore they could not have been in a position to enter appearance or file a Defence. That their annexed Draft Defence dated 14<sup>th</sup> May, 2024 triable issues and therefore setting aside of the judgment was eminent so that they could be given an opportunity to defend the instant claim in the absence which they would



suffer most which would be unjust and against the principles of natural justice. They placed reliance in the decided case of *Murtaza Hassan & Another v Ahmed Slad Kulmiye* [2020] eKLR. That it was therefore in the interest of justice and fairness that the prayers sought in their Application be granted.

### **Determination**

19. I have considered the Application herein that seeks to set aside the ex-parte judgment of the 28<sup>th</sup> July 2023, the Applicants' submissions, the authorities therein cited and the relevant provision of the law. Directions had been taken by parties to canvass the Application by way of written submissions, wherein only the 2<sup>nd</sup> to 5<sup>th</sup> Applicants complied.
20. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that the Respondents having failed to comply by filing their submissions are deemed as having failed to defend the same and therefore as it stands, the Application herein is un-defended, the failure by the Respondents to exercise the leave granted to them to file written submissions clearly demonstrating their lack of interest and/or seriousness on their part to defend the Application. This notwithstanding, I have to interrogate the Applicants' application as is expected of me as not all unopposed applications ought to be allowed automatically.
21. The 2<sup>nd</sup> to 5<sup>th</sup> Applicants in their application, contend that pursuant to the filing of the instant case, the Respondents failed to serve them with the summons to enter appearance or any court documents hence they had been denied an opportunity to file their Defence and defend the instant suit resulting in the impugned ex-parte judgment of the 28<sup>th</sup> July, 2023 wherein the decree and consequential orders were adverse to them. That in this regard, there be an order of setting aside of the impugned judgment.
22. I find the issue that arises for determination as being:
  - i. Whether there has been raised sufficient ground to set aside the judgment and if so;
  - ii. Whether there should be stay of execution of the impugned judgment
  - iii. Who should bear the cost.
23. The law applicable for setting aside judgment or dismissal is Order 12 Rule 7 of the Civil Procedure Rules which provide as follows;

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.”
24. Setting aside a judgment is a matter of the discretion of the court, as was held in the case of *Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd* [2014] eKLR where the court citing relevant cases on the issue held inter alia:-

The discretion is free and the main concern of the courts is to do justice to the parties before it (see *Patel vs E.A. Cargo Handling Services Ltd.*) the discretion is intended 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see *Shah vs. Mbogo*). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei*



District Administration vs Gasyali. It also goes without saying that the reason for failure to attend should be considered."

25. The Court of Appeal for Eastern Africa in the case of Mbogo v Shah [1968] EA 93, held that for the court to set aside a judgment, the court must be satisfied about one of the two things namely:-
  - a. either that the Defendant was not properly served with summons; or
  - b. that the Defendant failed to appear in court at the hearing due to sufficient cause.
26. I have considered the reasons as presented by the Applicants in their quest to set aside the judgment delivered on the 28<sup>th</sup> July, 2023 to wit that there had been no service of the summons to enter appearance or any court documents upon them and that they had only come to learn of the case facing them after the 4<sup>th</sup> Applicant had stumbled upon the suit on 12<sup>th</sup> April 2024 when he had goggled his name. That on consulting his Advocate they had learnt of the impugned Judgement of 28<sup>th</sup> July 2023.
27. That service had been done through the Nation Newspaper which neither of them had seen otherwise they would have filed a Defence and defended themselves.
28. That they had a good defense which raised triable issues having bought the suit properties from the 1<sup>st</sup> Defendant who had a duly authorized Power of Attorney from the Respondents and therefore it was only fair to allow them to exercise their fundamental right to be heard on merit as enshrined under Article 50(1) of the Constitution. That they would suffer prejudice were the ex-parte judgment not set aside.
29. I took time to peruse the entire record of events that had taken place and each action since the suit was instituted in court until the entry of the Judgment herein. A perusal of the proceedings of 22<sup>nd</sup> November 2017, indicate that the court had allowed the Respondents to serve, upon the Applicants, the summons and notices by advertisement which was done via the Daily Nation of 24<sup>th</sup> November 2017 wherein on the 22<sup>nd</sup> January 2018, the court had been satisfied that service had been effected wherein it had proceeded to hear and determine the application on the interim orders sought thereby rendering its ruling on the 7<sup>th</sup> February 2018 on which day it directed for service of the Notice for the hearing of the main suit vide advertisement. This was done vide the Daily Nation newspaper of 11<sup>th</sup> April 2018.
30. The matter proceeded for hearing ex parte partly on 7<sup>th</sup> May 2018 wherein the court stood down the witness and on the 26<sup>th</sup> March 2019, directed for service upon the Applicants through their email addresses, WhatsApp or registered postal addresses to their last known addresses.
31. An Affidavit of Service sworn on 27<sup>th</sup> June, 2019, indicate that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants had been served through their email addresses being Mainajonathan@gmail.com and madach8@yahoo.com respectively, whereas the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Applicants had been served, while awaiting to have a meeting, at Cool Breeze Café which was along Kenyatta Road-Naivasha. An annexure to the Affidavit of service of 27<sup>th</sup> June, 2019 marked as FW-1 shows an email written to the Respondents by the 2<sup>nd</sup> Applicant madach8@yahoo.com dated 4<sup>th</sup> December 2018 confirming knowledge of the presence of the matter in court in the following terms;

“So you were following the case but didn’t enough of your position to respond to the summons and attend the court proceedings?”
32. The court having been satisfied that service had been effected upon the Applicants, proceeded with the matter, wherein on the 13<sup>th</sup> February 2023, an order had been issued for the amended Plaint be



served through substituted service which was done again via an advertisement in the Daily Nation of 11<sup>th</sup> March 2023. The matter then proceeded with the hearing to its logical conclusion wherein the impugned judgement had been rendered on the 28<sup>th</sup> July 2023. On 24<sup>th</sup> January 2024 the court ordered for service of the court's decree of 13<sup>th</sup> October 2023 upon the Applicants via advertisement and for the execution process to be undertaken.

33. Service of pleadings is crucial in any dispute as no one should be condemned unheard. While service by advertisement is proper service, and whereas the Applicants have asserted that they had not seen and or read the Daily Nation newspapers through which service had been effected, in my view whereas that could have been the case, wherein I could have given them a benefit of doubt, yet what in my opinion broke the camel's back was the email dated 4<sup>th</sup> December 2018 and marked as FW-1 which had been written to the Respondents by the 2<sup>nd</sup> Applicant using her email address madach8@yahoo.com to which service had been effected. The said Respondent had confirmed knowledge of the pendency of the matter in court. The discretion to set aside an ex-parte judgment is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice and therefore I find the reason given by the Applicants that they did not see the advertisement and were therefore not aware of this suit as a reason to warrant the setting aside of the impugned ex-parte judgment not plausible and is herein rejected alongside the application to have the hearing proceedings of 24<sup>th</sup> April, 2023 set aside.

34. In the end, the Notice of Motion Application dated 23<sup>rd</sup> April, 2024 is herein dismissed with costs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 7<sup>TH</sup> DAY OF NOVEMBER 2024.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

