



REPUBLIC OF KENYA



KENYA LAW
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**Thairu v National Land Commission & 53 others (Environment & Land
Petition 376 of 2014) [2024] KEELC 7527 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7527 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 376 OF 2014
AA OMOLLO, J
NOVEMBER 7, 2024**

BETWEEN

PROF KIHUMBU THAIRU PLAINTIFF

AND

**NATIONAL LAND COMMISSION & 53 OTHERS & 53 OTHERS & 53
OTHERS DEFENDANT**

RULING

1. The application dated 3rd May, 2024 is taken out by the 21st – 54th Defendants and the 1st – 5th Interested Parties who are hereafter referred to as Applicants. They are seeking to be granted ORDERS;
 1. Spent
 2. Spent
 3. That the Honourable Court be pleased to add and/or enjoin the persons named in this application as intended interested parties and/or applicants as interested parties in this suit.
 4. That the Honourable Court be pleased to set aside the ex parte judgment delivered herein on 2nd November, 2023 as well as any decree extracted therefrom as well as all consequential orders thereto.
 5. That those of the applicants who happen to be defendants herein be granted leave to defend the plaintiff's suit.
 6. That the costs of this application be proved for.
2. The application is premised on several grounds listed on its face and which I summarise as follows;
 - a. The applicants became aware of the decree when it was pasted on their gates on 3rd May, 2024



- b. They have extensively developed their homes on the suit property
 - c. That they do not know Umoja III CBD previously sued as a defendant in the plaint dated 26th March, 2014.
 - d. The other defendants were only added on 2nd June, 2022 and at the time the 26th, - 31st and 46th Defendants were long dead.
3. The Applicants avers that the Plaintiff/Respondent did not extract and serve summons after they amended the plaint on 2nd June, 2022. Thus, the pleadings and proceedings leading to the judgment rendered were a nullity. They argue that the Deputy Registrar has no powers to grant the plaintiff orders to serve the summons via advertisement as happened on 17th August, 2022.
 4. The Applicants asserted that the newspaper advertisement of 5th September, 2022 appearing at page 35 of the Standard Newspaper never got to their attention. That the failure to see the advertisement was not deliberate as some of them are completely illiterate and incapable of reading any newspaper. That they have an answerable defence to the claim arguing the claim was barred by Section 7 of the Limitation of Actions Act. They urged the court to grant the orders sought.
 5. The application was also premised on the affidavit of Eric Omollo Odhiambo the 32nd Defendant sworn on 3rd May, 2024. It is sworn on behalf of the listed Applicants who have signed authority to plead. He deposed that the decree was pasted on their gates by goons. That until 3rd May, 2024 they were not aware of this suit. He deposes that some of the people sought to be evicted are not parties to this suit while some who are not in occupation are sued as Defendants.
 6. Paragraphs 10 – 25 of the supporting affidavit repeated the grounds listed on the face of the motion. He reiterated that all the Defendants named in the amended plaint have been in adverse possession of the suit property for 20 years to the date of 2nd June, 2022 when they were sued. He urged the court to allow the application.
 7. The Plaintiff/Respondent filed a replying affidavit in opposition to the application. He avers that the person swearing the affidavit in support of the application did not obtain authority from all the 2nd to 54th Defendants to act on their behalf. He averred that the Applicants admitted they did not have proprietary rights over the suit property hence their offers to purchase vide their letter dated 18th March, 2013. The Respondent contends that the Applicants were duly served by substituted service vide an advertisement in the Standard Newspaper of 26th August, 2022.
 8. He deposed further that no satisfactory or reasonable explanation has been tendered by the Applicants/ Defendants as to why they failed to attend court or file a defence despite having been duly served. That the Applicants deliberately failed to enter appearance in the suit whilst sitting on the Respondent's property illegally and unlawfully.
 9. The Respondent avers that the application is an attempt to prevent him from enjoying the fruits of his judgment. On joinder of the interested parties, the Plaintiff states that they cannot be joined in a suit which is already heard and determined. He added that the Applicants have not met the threshold for grounds to a review a judgment. He urged the court to dismiss the application.
 10. The Respondents filed written submissions dated 20th June, 2024 but the Applicants did not file any. The grounds for setting aside an *ex parte* regular judgment is settled in case law. For instance in the well known case of *Mbogo v Shah* [1968] EA 93, at page 95, Sir Charles Newbold P expressly approved



Harris J’s test of the principles it was necessary to consider in the exercise of the judicial discretion as to whether to set aside a judgment or not, as follows:

“Whether ... in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed.”

11. Some of the Applicants are already parties to this suit but they did not participate in the proceedings before the judgement was rendered. The explanation for not entering appearance is because they were not aware of the suit until the goons pasted a copy of the decree on their gates. They have acknowledged that they have become aware that there was service by advertisement placed in the standard newspaper of 26th August, 2022. That they did not see the advertisement because some of them do not know how to read. However, the Applicants have not given the particulars of those among them that do not know how to read.
12. The applicants also took issue with the powers of the Deputy Registrar to grant an order permitting service by way of advertisement. I have perused the court file and noted that vide application dated 9th June, 2015, the Plaintiff/Respondent had sought under prayer 3, leave to serve the Defendants by way of advertisement. On 16th September, 2015 Justice Okong’o while hearing the said application directed the Plaintiff to make further attempts of serving the Defendants/Applicants. The judge said that if the Respondent failed, he shall be at liberty to apply to effect service through substituted means.
13. Whether the Deputy Registrar can make orders for substituted service, Order 49 rule 7 of the Civil Procedure Rules, the Registrar may hear and determine applications made under the following orders and rules.
 - i. ...
 - ii. ..
 - iii. Order 3, 5 and 9
14. Service of summons to enter appearance is provided for under Order 5. Therefore, the Deputy Registrar had power to hear and determine an application for substituted service. In any event the objection raised was not supported by law as the court was not addressed by way of submissions to support the objection. In this case, the service of summons to enter appearance upon parties to the suit and those who may have been interested in the suit property such as the intended interested parties were duly served/notified. The law does not impose an obligation on the plaintiff to ensure the newspaper advertisement comes to the knowledge of the persons being served.
15. The second reason why the judgment would be set aside is where the Applicants have shown they have a defence on merits. I have looked at the documents annexed to the affidavit in support of the motion. None of the annexures include a draft statement of defence. Mr. Erick Omollo Odhiambo who swore the affidavit in support of the motion stated thus at paragraph 28;

“That all the defendants named in the Plaintiff’s suit as amended on 22.6.2022 had been in adverse possession of the suit property for at least 20 years when the plaintiff purported to institute against them on 3rd June 2022.”



16. On the same breach he deposes at paragraph 9 of the same affidavit

“That the plaintiffs suit enjoined some Applicants herein as Defendants but those people have never been in occupation of the suit property and these are; Lydia Wairimu Kamurua, Nelly Wachui Mwangi, Patrick Gitau Kiono, Mary Wamaitha Gitau, Daniel Musembi Mutata, Samuel Murithi Kingori, John Macharia Kogi and Mary Wamboi Kamau.”

17. The persons listed in paragraph 9 of the affidavit in support of the motion are the 1st to 9th intended Interested Parties seeking to be joined in this suit. If their representative is swearing on oath that they have never been in occupation of the suit property, the question now is why do they want to come on board in the suit? From the Applicants’ own pleadings, they state that not all parties sued as Defendants live on the suit property so it is not discernable who are these who have occupied the suit property for over 20 years as alleged.

18. I also observed from the authority to plead filed that 19 of the 44 applicants have also not signed the authority to Eric Omollo Odhiambo to plead on their behalf. Setting aside is a discretion of the court which must exercised judiciously so as not to aid a party intending at delaying the cause of justice and an applicant must satisfy the court that they merit the exercise of such discretion. In the absence of a draft defence, and the lack particulars on why the 1st to 9th intended Interested parties want to join this suit, I am not convinced that the Applicants are diligent. Equity aids the diligent not the indolent and in this case they (Applicants) are guilty of indolence.

19. In light of the circumstances of this application, I find no merit and proceed to dismiss it with costs to the Plaintiff/Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER, 2024

A. OMOLLO

JUDGE

