



**Thiong'o & another v Nguru (Being a Representative of the Estate of Mary Mumbi Nguru - Deceased) & another (Environment and Land Appeal E004 of 2023) [2024] KEELC 13560 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13560 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT AND LAND APPEAL E004 OF 2023  
AK BOR, J  
NOVEMBER 7, 2024**

**BETWEEN**

**JOSEPH MURIITHI THIONG'O ..... 1<sup>ST</sup> APPELLANT**

**STEPHEN GATHUA NGURU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOSEPH WANJAU NGURU (BEING A REPRESENTATIVE OF THE ESTATE OF MARY MUMBI NGURU - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, NYANDARUA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. In this appeal, the 1<sup>st</sup> Appellant challenges the ruling and order made by Hon. P. Gichohi (Chief Magistrate) which was delivered by the Hon. S. Mugute Senior Principal Magistrate (SPM) on 26/1/2023 in Nyahururu CM ELC Case No. 59 of 2019 in which the Learned Magistrate dismissed the 1<sup>st</sup> Appellant's application dated 1/7/2022. He challenges the finding by the trial court that the draft defence did not disclose a good defence based purely on the spelling of names and not on the substance of the defence.
2. The Learned Magistrate was also faulted for finding that the ex parte judgment entered against the Appellants was regular yet it the contention is that there was no proper service effected on the Appellant. The other grounds are that the Learned Magistrate made assumptions that there was fraud on the part of the Appellants yet the Appellants were not afforded an opportunity to be heard and to present evidence on the legality of the title.
3. Further, that the trial court erred when it failed to acknowledge that the 1<sup>st</sup> Respondent did not effect personal service on the Appellant for seven years yet the 1<sup>st</sup> Appellant is a neighbour while the 2<sup>nd</sup> Appellant was a brother to the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Appellant maintained that he had been denied



- a fair hearing and was condemned unheard contrary to the rules of natural justice. The Appellants contended that the Learned Magistrate relied on extraneous and irrelevant matters and urged the court to set aside the ruling of the trial court delivered on 26/1/2023 and allow the application dated 1/7/2022.
4. The appeal was canvassed through written submissions which the court has read and considered. The Appellants submitted that sometime in June 2022, the 1<sup>st</sup> Respondent served the Appellants with a decree issued on 22/4/2022 and a copy of search indicating that he had been registered as the owner of Laikipia/Salama/Muruku Block 1/212 while giving the Appellants one month to vacate the suit property. The Appellant was not aware of the proceedings and claimed that he had held a good title since 2013 having purchased the suit property for value and openly occupying the land after taking possession from the 1<sup>st</sup> Respondent.
  5. On perusal of the file, the Appellant came across the affidavit of service sworn on 28/2/2016 claiming that summons were served upon his farm manager yet he did not have a farm manager. He added that the name of the farm a manager was not revealed. He maintained that he and his wife had been residing on the suit property and never left to go to Nyeri as stated in the affidavit of service.
  6. That on perusing the extract of the Daily Nation of 3/7/2019 which alleged that he had been served through substituted means, he noted that the name indicated in the newspaper was Josphat Muriithi Thiongo yet his name was Joseph Muriithi Thiongo. That being semi-literate and living in a rural area in a farm, the 1<sup>st</sup> Appellant does not read newspapers and had no way of knowing that Josphat was referring to him. He emphasised that he lived as a close neighbor to the 1<sup>st</sup> Respondent who lives on parcel no. Laikipia/Muruku Block 1/227 and that at no time during the subsistence of the suit did he intimate that there was a suit filed in court against the 1<sup>st</sup> Appellant despite them meeting severally in person.
  7. The Appellants filed an application seeking to set aside the ex parte proceedings and the default judgment and decree issued on 22/4/2022. In the ruling delivered by Hon. S. Mogute, SPM, on 26/1/2023, the court found that the 1<sup>st</sup> Appellant had failed to demonstrate that he had a defence on merit to warrant the setting aside of the judgment.
  8. The 1<sup>st</sup> Appellant submitted that setting aside of ex parte judgment was governed by Order 10 Rule 11 of the Civil Procedure Rules which gives the court discretion to set aside or vary that judgment or any consequential decree or order upon terms which are just. The Appellant relied on CMC Holding Limited v Nzioki, which unfortunately was not furnished to the court, on the factors for consideration by the court in exercising its discretion in an application for setting aside ex parte judgment. These are whether proper service was effected and whether there was an arguable defence. The 1<sup>st</sup> Appellant contended that service was effected through substituted means in the Daily Nation on Josphat Muriithi Thiongo instead of Joseph Muriithi Thiongo which is an indication that it was a different person altogether who was served. The other ground was that being semi-illiterate and never having read newspapers in his lifetime, a newspaper was not the proper means of effecting service on the 1<sup>st</sup> Appellant.
  9. The 1<sup>st</sup> Appellant was emphatic that he was not served with the summons. He relied on Patel v East African Cargo Handling Limited (1974 EA75) where the court observed that its main concern was to do justice to the parties and that the court would not impose conditions on itself after the wide discretion given by the rules. The court went on to define a defence on merit as that which raises a triable issue and should go to trial for adjudication.



10. The Respondents submitted that although the 1<sup>st</sup> Appellant was insisting that his name was Joseph and not Josphat, the copy of the title deed issued to him on 20/5/2013 bears the name Josphat Muriithi Thiongo. Further, that when the 1<sup>st</sup> Respondent applied for a copy of the green card for the suit property it came out in the name of Josphat Murithi Thiongo which is what informed the name used in the suit papers and the newspaper advertisement. He maintained that the 1<sup>st</sup> Appellant used to cultivate the suit property from a far and that his whereabouts were unknown. After the decree was issued, the 1<sup>st</sup> Respondent proceeded to execute the decree to have the suit property registered in his name as the Administrator of the Estate of the late Mary Mumbi Nguru.
11. The 1<sup>st</sup> Respondent maintained that Order 5 Rule 17 of the Civil Procedure Rules allows for substituted service where the court is satisfied for any reason that the summons cannot be served personally in accordance with Order 5. He added that the whereabouts of the 1<sup>st</sup> Appellant were not known and that the 2<sup>nd</sup> Appellant is yet to be served with the appeal documents.
12. The 1<sup>st</sup> Respondent relied on James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another [2016] eKLR where the court distinguished a default judgment that was regularly entered from one which was irregularly entered. That in a regular default judgment, the applicant would have been served with summons to enter appearance but failed to appear or file a defence. Such an applicant was entitled under Order 10 Rule 11 of the Civil Procedure Rules to move the court to set aside the default judgment and grant him leave to defend the suit. The court stated that the factors to be considered were the reasons for the failure by the applicant to file his appearance or defence, the length of time that had elapsed since default judgment was entered, whether the intended defence raised triable issues and the prejudice both parties stood to suffer.
13. The 1<sup>st</sup> Respondent submitted that the trial court was convinced that the 1<sup>st</sup> Respondent could not trace the Appellant for four years after filing suit in 2015 and that substituted service was the only option for effecting service. That on evaluating the evidence tendered by the 1<sup>st</sup> Respondent, the trial court was convinced that the suit property was illegally transferred to the 2<sup>nd</sup> Appellant and eventually to the 1<sup>st</sup> Appellant. The 1<sup>st</sup> Respondent submitted that the 1<sup>st</sup> Appellant should claim against the 2<sup>nd</sup> Appellant and that in the absence of the 2<sup>nd</sup> Appellant, the 1<sup>st</sup> Respondent and 1<sup>st</sup> Appellant were strangers. He maintained that proper service was effected and urged that the judgment and decree should not be disturbed.
14. Regarding the 1<sup>st</sup> Appellant's claim that he lived in the rural area, the 1<sup>st</sup> Respondent submitted that ignorance was not a defence and added that if the 1<sup>st</sup> Appellant was not Josphat, then he should stay away from this suit. The 1<sup>st</sup> Respondent urged the court to dismiss the appeal and award him costs.
15. The 2<sup>nd</sup> Respondent did not participate in the proceedings.
16. The issue for determination is whether the court should allow the appeal by setting aside the orders issued by the Learned Magistrate on 30/11/2022 delivered on 26/1/2023. The main factors which this court must consider are whether proper service was effected on the Appellants and whether the Appellants had an arguable defence.
17. In determining the application seeking to set aside the ex parte proceedings, the trial court relied on the affidavit of Herman Mwangi sworn on 28/1/2016 on the service said to have been effected on the 1<sup>st</sup> Appellant. The court relied on paragraphs 3, 4, 5 and 6 where the process server deponed that he travelled to Karampton Trading Centre on 22/10/2015 and was directed to the 2<sup>nd</sup> defendant's farm and that he effected the service on the farm manager. The court also relied on the affidavit of service sworn by Wangechi Wangari advocate on 22/1/2021 attaching the advertisement in the Daily Nation



of 3<sup>rd</sup> July 2019 as evidence of service on the defendants by substituted means as ordered by the court on 25/5/2019.

18. The trial court noted that despite the 1<sup>st</sup> Appellant claiming that his name was Joseph Muriithi Thiongo, he relied on the sale agreement dated 15/5/2013 attached to his affidavit which gave the name of the purchaser as Josphat Muriithi Thiongo. The court found as a matter of fact that the Appellant was Josphat Muriithi Thiongo and that he was duly served with the summons to enter appearance but failed to enter appearance or file a defence. The court found that the 1<sup>st</sup> Appellant had failed to demonstrate that he had a defence on merit to warrant the setting aside of the judgment.
19. It is noteworthy that the sale agreement annexed to the application dated 1/7/2022 gave the purchaser's name as Joseph but the copy of the title issued on 20/6/2013 bears the name Josphat Muriithi Thiongo. The sale agreement dated 15/3/2013 was between the Appellants, with the 2<sup>nd</sup> Appellant indicated as the vendor and the 1<sup>st</sup> Appellant as the purchaser of the suit property. Based on the 1<sup>st</sup> Appellant's disclosure that he was semi-literate, he may not have realised that his title deed bore the name Josphat instead of Joseph.
20. The 1<sup>st</sup> Appellant produced a copy of his identity card which confirms that his name is Joseph Muriithi Thiongo. The finding by the Learned Magistrate that the 1<sup>st</sup> Appellant's name was Josphat was erroneous since a national identity card is the known form of identification. The fact that service was effected on Josphat and not Joseph confirms that the service said to have been effected on the 1<sup>st</sup> Appellant was not proper. The court notes that the Appellant's name appearing on this appeal is Joseph and not Josphat.
21. In the draft defence and counterclaim, the Appellant averred that he was the absolute proprietor of the suit property and that the former initial owner transferred the suit property to the 2<sup>nd</sup> Appellant on 16/8/1977 and that he purchased the land on 15/5/2013. He maintained that the transfer of the suit property from the late Mary Mumbi Nguru to the 2<sup>nd</sup> Appellant was proper and lawful. He sought to have the 1<sup>st</sup> Respondent restrained from dealing with the suit property and to be reinstated on the title. He averred in the counterclaim that the 2<sup>nd</sup> Appellant had been in actual possession of the suit property since the 1990s before he took over possession in 2013. He also mentioned that there had been many disputes over the suit property.
22. In this court's view, these are triable issues that ought to be determined at the trial. The 1<sup>st</sup> Respondent did not controvert the 1<sup>st</sup> Appellant's averment that despite being a close neighbor of the 1<sup>st</sup> Respondent's, he never intimated to him that there a suit had been filed in court against him even though they met severally in person. The 1<sup>st</sup> Appellant claimed that he had been in possession of the suit land. It was only fair that he be allowed to explain the root of his title before the court cancelled it and directed the issuance of a title to the 1<sup>st</sup> Respondent.
23. The appeal is allowed in the following terms:
  - i. The ruling of the Learned Magistrate dated 30/11/2022 and delivered on 26/1/2023 is set aside.
  - ii. The ex parte proceedings before the trial court, judgment, decree and all consequential orders are set aside and the suit will be heard de novo.
  - iii. The Appellants are granted leave to their defences within 14 days of the date of this judgment.
  - iv. The grant of leave is conditional upon the Appellants paying throw away costs of Kshs. 200,000/= to the 1<sup>st</sup> Respondent within 45 days of the date of this judgment.



v. The 1<sup>st</sup> Respondent is awarded the costs of the appeal to be borne by the 1<sup>st</sup> Appellant.

**DELIVERED VIRTUALLY AT NAIROBI THIS 7<sup>TH</sup> DAY OF NOVEMBER 2024.**

**K. BOR**

**JUDGE**

In the presence of: -

Mr. Ndegwa Wahome for the Appellants

Ms. Wangechi Wangare for the 1<sup>st</sup> Respondent

No appearance for the 2<sup>nd</sup> Respondent

