



REPUBLIC OF KENYA



KENYA LAW
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**Mahulo v Okello & 4 others (Environment and Land Case Civil Suit
150 of 2014) [2023] KEELC 592 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 592 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 150 OF 2014
SO OKONG'O, J
FEBRUARY 9, 2023**

BETWEEN

GRACE AYUGI MAHULO PLAINTIFF

AND

SAMUEL OKELLO 1ST DEFENDANT

GEORGE OCHIENG 2ND DEFENDANT

LAMECK ARODI 3RD DEFENDANT

MWANAISHA TUNDUKA 4TH DEFENDANT

BRIGIT ODERA 5TH DEFENDANT

RULING

1. The plaintiff brought this suit against the defendants on June 3, 2014 seeking among others the following reliefs;
 1. A declaration that the plaintiff is the proprietor of all that parcel of land known as Title No Kisumu/Kanyakwar "A"/27 (hereinafter referred to as "the suit property") and that the defendants are trespassers thereon.
 2. Eviction order against the defendants jointly and severally.
 3. Mesne profits for loss of use at the rate of Kshs 30,000/- per month with effect from August 2, 2012 until vacant possession is given.
 4. Costs of the suit.
2. There are several affidavits of service on record showing that the defendants were served with summons to enter appearance together with a copy of the plaint on various dates in June 2014. The 5th defendant



is said to have been served with Summons to Enter Appearance on 9th June 2014 at Ligege, Ukwala Sub-County. The 1st and 3rd defendants entered appearance and filed a statement of defence while the 2nd, 4th and 5th defendants did not enter appearance and at the request of the plaintiff, the court entered interlocutory judgment against them on July 3, 2014.

3. The hearing of the suit commenced before Kaniaru, J on January 22, 2015 and continued before Kibunja, J on 1st December 2016 and Ombwayo, J on February 3, 2021 and 25th January 2022 when the plaintiff's case was closed. The matter was fixed for the hearing of the defence case on March 21, 2022. On March 21, 2022, the 1st and 3rd defendants and their advocates did not come to court on time for the hearing and the matter did not proceed. It was adjourned to May 5, 2022. On May 5, 2022, the 1st and 3rd defendants and their advocates did not turn up in court and the defendants case was closed and the plaintiff directed to file submissions. The court fixed the matter for judgment on October 13, 2022. On October 13, 2022, the court entered judgment for the plaintiff as prayed save for the prayer for mesne profits that was disallowed. On December 8, 2022, the court set aside the proceedings of May 5, 2022 and the judgment made on October 13, 2022 on the application of the 1st defendant and re-opened the 1st defendant's case for hearing.
4. What is now before the court is the 5th defendant's application dated January 18, 2023 seeking an order that the judgment entered on October 13, 2022 referred to above be set aside and that the 5th defendant be granted leave to file and serve her statement of defence out of time. The application has been brought on the grounds set out on the face thereof and on the affidavit of Josephine Odera sworn on January 18, 2023. The 5th defendant has averred that she has been sued in these proceedings as Brigit Odera and that she was not served with the Summons to Enter Appearance. The 5th defendant has averred that judgment was entered in the matter on October 13, 2022 in which she was condemned unheard. The 5th defendant has averred that she has a good defence to the plaintiff's claim. In her supporting affidavit, the 5th defendant has averred that she heard some of her neighbours whispering that she and her other neighbors had lost a court case and would be evicted soon. The 5th defendant has averred that she was not aware of any court case against her and that it was upon instructing her advocates on record to peruse the court record that she learnt of this suit, the proceedings that had taken place and the judgment of October 13, 2022.
5. The 5th defendant has averred that she could have entered appearance and defended the suit had she been served with Summons to Enter Appearance. The 5th defendant has averred that the suit property was initially known as Title No Kisumu/Kanyakwar "A"/27 and Title No Kisumu/Kanyakwar "A"/28 (hereinafter referred to only as "Plot No 28"). The 5th defendant has averred that Plot No. 28 was adjudicated in the name of her deceased husband. The 5th defendant has averred that her family put up houses on Plot No 28 which is now part of the suit property which they have occupied for several years. The 5th defendant has averred that her family has acquired the said portion of the suit property by adverse possession. The 5th defendant has averred that her family has invested heavily in the said portion of the suit property and that they stand the risk of being evicted from the property following the judgment sought to be set aside.
6. The 5th defendant's application is opposed by the plaintiff through a replying affidavit sworn on January 23, 2023. The plaintiff has averred that she is a widow aged 88 years. The plaintiff has averred that the 5th defendant was served with Summons to Enter Appearance together with the plaint and other documents by a process server by the name Amos Eliud Osango. The plaintiff has averred that the 5th defendant's application is an afterthought and that the same is intended to delay the plaintiff from enjoying the fruits of the judgment made in her favour. The plaintiff has averred that the 5th defendant's claim that she has acquired a portion of the suit property by adverse possession has no



- basis. The plaintiff has averred that Plot No 28 claimed by the 5th defendant to be part of the suit property was cancelled from the adjudication map. The plaintiff has averred that the 5th defendant has not challenged the affidavit of the process server who served her with Summons to Enter Appearance.
7. When the application came up for hearing on February 8, 2023, the plaintiff's advocate did not appear in court while the 5th defendant's advocate relied on the affidavit in support of the application and left the matter for the court's determination. I have considered the 5th defendant's application together with the affidavit filed in support thereof. I have also considered the replying affidavit by the plaintiff in opposition to the application. The issues that I have been called upon to determine are; whether the 5th defendant has put forward sufficient grounds to warrant the setting aside of the interlocutory judgment entered herein against her on July 3, 2014 and the final judgment entered against her on October 13, 2022 and for leave to be granted to her to file a statement of defence. As I have mentioned earlier in the ruling, the proceedings of May 5, 2022 that culminated in the judgment of October 13, 2022 were set aside together with the said judgment on December 8, 2022. It is not necessary therefore to set aside the judgment of October 13, 2022. The same is not in existence.
 8. That however still leaves in place the interlocutory judgment of 3rd July 2014 that was entered against the 5th defendant in default of appearance. Although the 5th defendant has not expressly sought the setting aside of this interlocutory judgment, the court cannot avoid delving into it now that the 5th defendant has sought leave to file a defence out of time. Such leave cannot be granted if the said interlocutory judgement remains in place.
 9. Order 10 rule 11 of the [Civil Procedure Rules](#) gives the court discretionary power to set aside interlocutory judgment entered in default of appearance upon terms as are just. The court's discretionary power must be exercised judiciously and not capriciously. The rationale behind the judicious exercise of discretionary powers was explained by the Court of Appeal in [Patriotic Guards Ltd v James Kipchirchir Sambu](#) [2018] eKLR as follows:

" It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit."
 10. The principles that the court applies in applications for setting aside ex parte orders and judgments were set out in [Shah v Mbogo](#) (1967) EA 116 as follows:

" the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice."
 11. In [Patel v EA Cargo Handling Services](#) [1974] EA 75, the court stated as follows at page 76 regarding the court's power to set aside ex parte judgments:

" The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as in the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits



does not mean in my view a defence that must succeed, it means as Sheridan, J put it “a triable issue: that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

12. In the same case, it was held that:

“ There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just.”

13. It is on the foregoing principles that the 5th defendant’s application falls for consideration. Before entering interlocutory judgment for the plaintiff against the 5th defendant on July 3, 2014, the court was satisfied that the 5th defendant had been served with Summons to Enter Appearance. The 5th defendant has contended that she was not served with Summons to Enter Appearance. As rightly pointed out by the plaintiff, the 5th defendant has not challenged the affidavit of service of Amos Eliud Osango sworn on June 3, 2014 in which he explained how he served the Summons to Enter Appearance upon the 5th defendant on June 9, 2014 at her home near Ligega Market, Ukwala Sub-County. The 5th defendant has not denied that her home is near Ligega Market and that she was at home on June 9, 2014 when she is said to have been served. In *Miruka v Abok & another* [1990] KLR 541, it was held that:

“ Where service is disputed there is a qualified presumption in favour of the process server. The burden lies on the party questioning the service, to show that the return is incorrect..... An affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings.”

14. In *Karatina Garments Ltd v Nyanarua* [1976] KLR 94, the court stated that:

“ Where one party to proceedings denies having been served with a relevant document, it is proper for the court to look into the matter; if the court is faced with conflicting affidavits as to the alleged service of process, it is proper that the deponents should be examined on oath in order to establish the truth.”

15. The burden was on the 5th defendant to convince the court that the process server swore a false affidavit and that she was not served. I am not satisfied that the 5th defendant has discharged this burden. It is my finding that the 5th defendant was served with Summons to Enter Appearance and as such the interlocutory judgment entered against her on July 3, 2014 was regular. In the absence of any explanation why the 5th defendant did not enter appearance and file a defence, I find no reason why the court should exercise its discretion in her favour. This matter has been pending in court for the last 8 years. The plaintiff is 88 years old and the plaintiff’s case has been closed. What remains is the hearing of the 1st and 3rd defendants’ cases. Setting aside the interlocutory judgment and allowing the 5th defendant to file her defence will mean that all the proceedings in the matter to date will be set aside and the hearing of the suit shall start afresh. I am of the view that it will not be fair to the plaintiff to do that. The 5th defendant has not persuaded me that she did not know of this suit until December 2022. The 5th defendant has claimed that she learnt of the suit through her neighbours. One wonders why those neighbours some of whom have actively participated in this suit from the beginning did not inform her earlier of the suit. The timing of the 5th defendant’s application coming soon after final judgment was entered against her among others on October 13, 2022 is suspect. I am satisfied that the 5th defendant was served with Summons to Enter Appearance and decided for reasons only known to her not to defend the suit. I am in agreement with the plaintiff that the application before the court is an afterthought.



16. I am also not persuaded that the 5th defendant has an arguable defence to the plaintiff's suit. The evidence placed before the court by the 5th defendant in support of her claim to a portion of the suit property shows that her claim is based on Plot No 28 which was cancelled from the adjudication map and record in 1985. The parcel of land on which the 5th defendant's claim over the suit property is based is therefore nonexistent. I am not persuaded either of the merits of the 5th defendant's adverse possession claim. The 5th defendant has not explained how she intends to pursue her adverse possession claim in this suit. There is no such claim in the draft defence annexed to the application.
17. Due to the foregoing, the 5th defendant's notice of motion application dated January 18, 2023 has no merit. The application is dismissed with costs to the plaintiff.

DATED AND DELIVERED AT KISUMU ON THIS 9TH DAY OF FEBRUARY 2023

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

N/A for the Plaintiff

Mr. Onyango C. for the 5th Defendant

Ms. J. Omondi-Court Assistant

