



**Gitere v Gitere Kahura Investments Limited & 3 others (Environment & Land
Case E049 of 2022) [2023] KEELC 15848 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15848 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E049 OF 2022**

**OA ANGOTE, J
MARCH 2, 2023**

BETWEEN

SAMUEL MBURU GITERE PLAINTIFF

AND

GITERE KAHURA INVESTMENTS LIMITED 1ST DEFENDANT

KENNETH KIMARI GITERE 2ND DEFENDANT

DAVID WAKANGU GITERE 3RD DEFENDANT

LUKAS WAITHAKA GITERE 4TH DEFENDANT

RULING

1. Before this court for determination is the defendants' (hereinafter 'applicants') notice of motion dated March 31, 2022 and brought under sections 1A, 1B and 3A of the *Civil Procedure Act*, order 40 rule 7 and order 51 rule 1 of the *Civil Procedure Rules 2010* and article 159(2)(d) of the *Constitution* of Kenya, 2010. The defendants/applicants are seeking that:
 - a. The honourable court be pleased to stay execution of the *ex-parte* orders given by Hon Justice Angote on March 14, 2022 and issued on March 22, 2022 pending the hearing and determination of this application.
 - b. The honourable court be pleased to discharge, vary and/or set aside the *ex-parte* order of injunction issued against the applicants herein on March 14, 2022 restraining them whether by themselves, their servants and/or agents from further acting on or otherwise processing the maps, deed plans and titles for subdivision of titles LR No 8943/7 and LR No 9946 (Midas Farm) and LR No 4872/1 and LR No 47872/2 (Ruiru Farms) pending the hearing and determination of this suit.



- c. The honourable court be pleased to discharge, vary and/or set aside the *ex-parte* order directing that the injunction order herein above be registered against the respective titles.
 - d. Spent.
 - e. The applicants having retrieved the application from the e-filing portal be deemed to have been properly served with the said application and be hereby granted leave to file their replying affidavit to the respondent's application for injunction dated February 10, 2022.
 - f. That the plaintiff (hereinafter 'respondent') be condemned in costs.
2. The application is based on several grounds and supported by the affidavit of David Gitere Wakangu, the 3rd applicant, in which he has deponed that the instant suit was filed by the plaintiff/respondent herein on February 10, 2022.
 3. It was deponed that the defendants/ applicants entered appearance on February 25, 2022 and filed a defence and a notice of preliminary objection on March 16, 2022 and that on March 24, 2022, they were served with a reply to defence and a mention notice indicating that the pre-trial hearing would be on June 13, 2022.
 4. On the same date, it was deponed, the defendants/applicants were also served with a court order dated 14th March and issued on March 22, 2022 by this court; that they were neither served with the said application nor a hearing notice and that consequently, the *ex-parte* hearing and the injunctive orders issued caught them by surprise.
 5. The 3rd defendant/applicant deponed that the said orders are void *ab initio* as the respondent procured them illegally and by non-disclosure of material facts; that the main suit is misconceived as it is partly a commercial matter and partly a succession matter and that this court therefore lacks jurisdiction to address it.
 6. The applicants argued that the respondent was wrongfully issued with temporary injunctive orders because, firstly, his claim does not disclose a *prima facie* case with a reasonable chance of success; secondly, that the respondent could easily be compensated by an award of damages and thirdly, that the respondent should not benefit from an injunction which is an equitable relief as he was guilty of material non-disclosure of facts.
 7. The applicants further argued that the service as evidenced by the respondent was improper and concealed and that as result, the *ex-parte* orders that followed should be set aside.
 8. The respondent filed a replying affidavit sworn on May 26, 2022 by the plaintiff's advocate. He denied the contents of the applicants' affidavit. He further deponed that the 2nd to 4th applicants were served with the application dated February 10, 2022 via Whatsapp on 22nd and February 28, 2022 and that this was after the clerk was unable to serve them personally.
 9. It was deponed that the 1st defendant/applicant was served through its email address (kahuragitere@gmail.com); that after the applicants were served with the papers, including the application dated February 10, 2022, they entered appearance and that this was evidence that they were aware of the hearing date.
 10. Consequently, it was deponed, no affidavit of service was filed; that it is inconceivable that the applicants could have received the plaint and not the application while all documents were in the same



bundle and that the present application should be dismissed and the orders issued on March 14, 2022 be maintained.

11. The applicants filed their submissions on August 10, 2022. They submitted that the *ex-parte* orders as issued were illegal as they were not served with the application dated February 10, 2022 and that the court must be satisfied that either the aggrieved party was not properly served with summons or that they failed to appear in court due to sufficient cause. The cases of [*Captain Philip Ongom v Catherine Nyero Owota*](#) SCCA February 14, 2001 [2003] KALR and [*Wachira Karani v Bildad Wachira*](#) [2016] eKLR were relied upon.
12. The applicants contended that they were never served with the impugned application nor a hearing notice; that if they had been served, they would have opposed the same as it is prejudicial to their interests and that the proof of service adduced in court were screenshots of Whatsapp messages sent to the 2nd to 4th applicants but no phone numbers were shown to prove that the documents were actually served on the 2nd to 4th applicants.
13. In conclusion, the applicants submitted that it is in the interest of justice that the *ex-parte* orders are set aside and the applicants granted the opportunity to be heard. The cases of [*Esther Wamaitba Njibia & 2 others v Safaricom Limited*](#) [2014] eKLR, [*Gibb Africa Limited v David Kiplagat Rotich*](#) [2020] eKLR and [*Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others*](#) [2013] eKLR were relied upon.
14. The respondent submitted that the provisions of order 40 rule 7 of the [*Civil Procedure Rules*](#) do not apply to the instant application as the orders were given at an *inter partes* hearing; that the applicants failed to attend court despite being duly served and that even if the court was to treat the orders as *ex-parte*, the applicants had not met the required threshold to warrant the court's discretion in setting aside the orders.
15. It was submitted that the non-appearance by the applicants was not inadvertent but was deliberate as they acknowledged receiving other documents in the bundle and that the applicants were not only served on Whatsapp, but a follow up Whatsapp message was sent reminding the applicants of the hearing date. The case of *Shah v Mbogo* (1967) EA 116 was relied upon.
16. The respondent submitted that the orders given on March 14, 2022 are meant to maintain the status quo and could have been given by the court on its own volition to allow preservation of the suit properties; that the court has jurisdiction to hear the main suit because the suit is about use, occupation and title to land and that the succession and commercial cases dealt with separate issues.

Analysis and Determination

17. The defendant/applicants have argued that the *ex-parte* injunctive orders should be set aside because they were not properly served with the application dated February 10, 2022. The respondent has argued that the orders should be upheld as the applicants were duly served but failed to appear in court.
18. Order 40 rule 7 of the [*Civil Procedure Rules*](#) provides:

“An order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”



19. In the case of *St Patricks Hill School Ltd v Bank of Africa Kenya Ltd* [2018] eKLR, the court held as follows:

“Similarly, this court has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if the injunction does not serve the ends of justice it was intended to serve when it was issued. Questions such as whether it is unjust to maintain the injunction in force or it is otherwise unjust and inequitable to let the order remain will be asked when considering an application to discharge an injunction.”

20. It is trite that in setting aside *ex parte* orders, the court must be satisfied of one of two things, namely, either that the respondent was not properly served with summons or that the respondent failed to appear in court at the hearing due to sufficient cause.

21. In the case of *The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & others* -civil appeal No 147 of 2006, the Court of Appeal of Tanzania, while deliberating on what constitutes sufficient cause opined thus:

“It is difficult to attempt to define the meaning of the words “sufficient cause.” It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputable to the appellant.”

22. From the foregoing, it is clear that the law allows for the setting aside/discharge of both injunctions and *ex-parte* orders where the circumstances of the case allow. In the instant application, the applicants have argued that the *ex-parte* orders should be set aside as they were not duly served with the application dated February 10, 2022.

23. I find that in the circumstances of this case, the contention that the applicants were not served with the application is plausible. The law on serving documents through mobile applications is set out as follows in order 5 rule 22c of the *Civil Procedure Rules*:

- “(1) Summons may be sent by mobile-enabled messaging applications to the defendant’s last known and used telephone number.
- (2) Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
- (3) Service shall be deemed to have been effected on mobile-enabled messaging services when the sender receives a delivery receipt.
- (4) An officer of the court who is duly authorized to effect service shall file an affidavit of service attaching the delivery receipt confirming service.”

24. According to the court record, there is no evidence that when the application came up for hearing on March 14, 2022, the respondent’s advocate presented evidence of service of the application dated February 10, 2022 on the applicants. He has stated in his affidavit that the fact that the applicants entered appearance in the main suit was enough evidence of the fact that they had been served with the application.



25. However, this scenario is not covered in the law as set out above and can therefore not be considered as effective service. The affidavit of service that was filed detailing the delivery receipt and stating that service was done on February 22, 2022 and February 28, 2022 was filed after the fact, on May 26, 2022.
26. The late filing of the affidavit of service was an afterthought on the part of the plaintiff's/respondent's advocate. The same cannot be relied upon to prove that the service was effected on 22nd and 28th February.
27. Although it has been argued that the defendants having entered appearance, it follows that they were served with all the pleadings, that is not true. The filing of the memorandum of appearance could as well mean that the defendant was only served with the summons to enter appearance.
28. Where a party serves the opponent with several court processes, an affidavit of service detailing the documents that were served is paramount. To the extent that there was no affidavit of serving stating that indeed the defendants were served with the application dated February 10, 2022 for injunctive orders together with the hearing notice of March 14, 2022, it follows that the orders that were issued by this court in the absence of the defendant should be set aside.
29. In view of the foregoing, I allow the application dated March 31, 2022 as follows:
 - a. The court hereby sets aside the order of injunction issued against the defendants/applicants herein on March 14, 2022 restraining them whether by themselves, their servants and/or agents from further acting on or otherwise processing the maps, deed plans and titles for subdivision of titles LR No 8943/7 and LR No 9946 (Midas Farm) and LR No 4872/1 and LR No 47872/2 (Ruiru Farms) pending the hearing and determination of this suit.
 - b. The plaintiff to pay the costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 2ND DAY OF MARCH, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for the Plaintiff

No appearance for the Defendant

