



Sanga (Suing in his Capacity as the Personal Representative of Sanga Mwambo Kai - Deceased) v Tebid Holdings Limited & 2 others (Environment & Land Case 88 of 2019) [2023] KEELC 15858 (KLR) (3 March 2023) (Ruling)

Neutral citation: [2023] KEELC 15858 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 88 OF 2019

MAO ODENY, J

MARCH 3, 2023

IN THE MATTER OF: LAND PARCEL KNOWN AS PLOT NO. CHEMBE/KIBABAMSHE/311

AND

IN THE MATTER OF: REGISTRATION OF LAND PARCEL KNOWN AS

PLOT NO. CHEMBE/KIBABAMSHE/311 BY A VESTING ORDER

AND

**IN THE MATTER OF: AN APPLICATION FOR DECLARATION
THAT THE PLAINTIFF HAS OBTAINED TITLE OVER LAND**

**PARCEL KNOWN AS PLOT NO. CHEMBE/KIBABAMSHE/311 BY VIRTUE OF THE
DECISION OF THE NATIONAL LAND COMMISSION DATED 7TH DECEMBER, 2018.**

BETWEEN

**ALPHONCE MWAMBO SANGA (SUING IN HIS CAPACITY AS
THE PERSONAL REPRESENTATIVE OF SANGA MWAMBO KAI -
DECEASED) PLAINTIFF**

AND

TEBID HOLDINGS LIMITED 1ST DEFENDANT

DISTRICT LAND REGISTRAR, KILIFI 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT



RULING

1. This ruling is in respect of Notice of Motion dated February 25, 2022 by the 1st Defendant seeking the following orders; -
 - a. Spent.
 - b. That pending the hearing of this application inter partes this Honourable Court be pleased to stay the execution of the decree and judgment entered herein on December 2, 2021.
 - c. That this Honourable Court be pleased to stay the execution of the decree and judgment entered herein on December 2, 2021 pending the hearing of the application hereof.
 - d. That this Honourable Court be pleased to set aside the judgment entered on December 2, 2021 against the 1st Defendant and the 1st Defendant be allowed to defend itself against the Plaintiff's claim.
 - e. That the costs of this application be provided for.
2. Counsel agreed to canvas the application vide written submissions which were duly filed.

1st Defendant's Submissions

3. The application was supported by the affidavit of Luca Fanini sworn on the February 21, 2022 where he deponed that sometime in January 2022 he was informed by his Advocates Kiarie Kariuki & Company that they had learnt from a potential buyer of the 1st Defendant's three properties in Malindi/ Kilifi that a third party had obtained a judgment against him.
4. The Applicant further deponed that the 1st Defendant was allegedly served with the Originating Summons by way of registered post which does not belong to the 1st Defendant and was only used at the time of incorporation of the 1st Defendant as he and the other subscriber did not have a post office box of their own and for that reason they did not and could not receive the Originating Summons as both shareholders and directors of the 1st Defendant reside in Italy.
5. The Applicant also stated that he has been condemned unheard in violation of the principles of natural justice despite being a bona fide purchaser for value having purchased the suit land from Mayungu Limited and that he has a good defence to the Plaintiff's claim.
6. It was the Applicant's case that unless the judgment of this court dated December 2, 2021 is stayed, the 1st Defendant will suffer irreparably as the execution of the said judgment may be completed as the Plaintiff has commenced the process execution.
7. Counsel filed submissions and relied on the grounds on the face of the application together with the Applicant's Supporting Affidavit and cited the case of *James Wanyoike & 2 Others vs Cmc Motors Group Limited & 4 Others* [2015] eKLR, where the court set out the principles and tests for setting aside *ex-parte* judgments.



8. Counsel submitted that the court has unfettered, unlimited and unrestricted jurisdiction to set aside an *ex-parte* judgment and that the test of setting aside such judgment is where there is a defence on merits, where there would be any prejudice to the Plaintiff and the explanation for any delay.
9. It was counsel's submission that this suit commenced through an Originating Summons dated October 14, 2019 and that it is trite law that a party in such a suit defends himself or herself by way of Replying Affidavit and once a Replying Affidavit is filed, the same is considered a defence.
10. Mr Kiarie identified three issues for determination as follows: -
 - a. Whether there is a replying affidavit on merits.
 - b. Whether there would be any prejudice to the Plaintiff.
 - c. What is the explanation for not filing the memorandum of appearance?
11. On the first issue as to whether there is a replying affidavit on merits, counsel submitted that the draft Replying Affidavit annexed to the Supplementary Affidavit raises triable issues that ought to be determined on merit by this Honourable court and relied on the cases of *Patel v East Africa Cargo Handling Service* [1974] EA 76 and *Sebei District Administration vs Gasyali & Others* (1968) EA 300.
12. Counsel further submitted that the 1st Defendant/Applicant has demonstrated vide the annexure "LF.5", that the draft replying affidavit raises triable issues whereby the 1st Defendant stated that it is an innocent purchaser for value without notice of defect in Mayungu Limited's title and that it was neither a party nor had knowledge of the proceedings before the National Land Commission thus contravening the principles of natural justice.
13. On the second issue as to whether the Plaintiff will suffer any prejudice, counsel submitted that there is no prejudice that will be occasioned to the Plaintiff because the Plaintiff has since 2008 when the 1st Defendant became the registered owner has not been in actual possession of the suit property.
14. Counsel further submitted that even though the Plaintiff has already executed the judgment and decree, the execution of the same is irregular and ought to be frowned upon by the Honourable court, that on February 4, 2022, the 2nd Defendant herein issued a Gazette Notice No. 1179 calling upon objections within 30 days from the date of the notice in regards to issuing a new land title in favour of the Plaintiff.
15. That however, on February 7, 2022 just three (3) days after the 2nd Defendant's notice, the 2nd Defendant issued a new land title over the suit property to the Plaintiff herein hence the title issued in favour of the Plaintiff is irregular as the same did not give ample time to the 1st Defendant to object to issuance therefore the Plaintiff cannot state that the court cannot issue orders in vein while knowing very well that the due process was not followed when the new land title was issued.
16. Counsel submitted that as per the Gazette Notice No 1179 of February 4, 2022, the 1st Defendant herein filed this application on March 1, 2022, before the expiry of the said notice, seeking inter alia for an order staying execution of the judgment of December 2, 2021, decree and consequential orders arising therefrom pending the hearing and determination of this instant application while oblivious of the fact that the judgment and decree had already been executed.
17. Mr Kiarie submitted that he who comes to equity must come with clean hands and that the Plaintiff and 2nd Defendant's hands are not clean as they have not tendered any explanations justifying the issuance of the new title to the Plaintiff only three (3) days after the notice.



18. Counsel also submitted that the 1st Defendant is ready and willing to comply with any orders of thrown away costs and an irregularity while executing the Judgment and decree should not be visited upon the 1st Defendant. Counsel further relied on the provisions of Order 10 rule 11 which gives the court powers to set aside or vary such judgment and any consequential decree or order upon such terms as are just.
19. On the issue as to why the 1st Defendant did not file a Memorandum of Appearance, counsel submitted that the Plaintiff alleges to having served summons to enter appearance and plaint through substituted service by registered post to the 1st Defendant's last known postal addresses being PO Box 80404-80100 Mombasa and 5272-80200 Malindi, but the 1st Defendant states that the said postal addresses are not the 1st Defendant's postal addresses and neither are they the 1st Defendant's directors' postal addresses.
20. Counsel submitted that the 1st Defendant only used PO Box 5272 when incorporating the 1st Defendant Company as the directors of the 1st Defendant Company did not have postal addresses of their own. That the 1st Defendant's directors and shareholders did not receive the Originating Summons herein therefore no service was affected upon the 1st Defendant Company.
21. Mr Kiarie relied on the case of *James Wanyoike & 2 Others vs CMC Motors Group Limited & 4 Others* (supra) where the court relied on the case of *Tree Shade Motors Ltd vs DT Dobie & Anor* [1995-1998] 1 EA 324 and held that even if service of summons in valid, the judgment will be set aside if defence raises triable issue and urged the court to set aside the judgment and allow the 1st Defendant to be heard on merit.
22. The 2nd and 3rd Defendants in response to the application dated February 25, 2022 filed grounds of opposition and stated that the application is devoid of merit since it does not meet the threshold for setting aside a judgment, that there are no grounds to warrant the setting aside of the judgment delivered on December 2, 2021 and that the service of summons upon the Applicant was proper, valid and effected in compliance with the provisions of Order 5 Rule 3 (b).

Plaintiff/respondent's Submissions

23. The Plaintiff in response filed a Replying Affidavit sworn on the 15th day of March, 2022 and stated in his affidavit that the applicant was duly served with the pleadings in this matter by way of registered post in accordance with Order 5 Rule 3 (b) of the Civil Procedure Rules.
24. It was the Respondent's case that the 1st Defendant had two registered postal addresses in Kenya, one in Mombasa and the other in Malindi which information they obtained from the green card and the records held at the Companies Registry.
25. The Respondent further stated that he had already been issued with a title deed to the suit property and as such, the 1st Defendant's application has been overtaken by events and the prayers sought are incapable of being granted.

Analysis and Determination

26. This is an application for stay of execution of the decree and setting aside of *ex parte* judgment dated December 2, 2021. The issues for determination is whether there was proper service on the 1st Defendant, whether the judgment was regular or irregular and whether the Applicants are entitled to stay of execution of the decree and setting aside judgment.
27. On whether there was proper service of the pleadings, it is important to note that the issue of service goes to the root of any *ex-parte* judgment; where the court is satisfied that there was no proper service,



it has the discretion to set aside and/or vary any ex-parte judgment entered and all the consequential orders thereto.

28. I have perused the affidavit sworn by Luca Fanini who asserted that he came to learn that the pleadings in this case were served by way of registered post to Post Office Box Number 5275 Malindi which does not belong to him and was only used at the time of incorporation of the 1st Defendant and that the 1st Defendant did not and could not receive the Originating Summons as both shareholders and directors of the 1st Defendant reside in Italy.
29. In as much as the applicant does not dispute that the postal address was indeed one that they provided to the Companies Registry during registration, the Applicant has explained the position in his affidavit that both directors reside in Italy and that the postal address neither belongs to the directors nor the company.
30. The issue of proper service of summons is critical in access to justice and it is indeed the first step of signaling a part that a case has been filed against him/her to enable a response to be filled within the stipulated time. This also is a rights issue where a person is entitled to a right to be heard and a right to a fair hearing applying the principles of natural justice.
31. If a party is not properly notified of a case brought against him or her, then the proceedings and orders that emanate from such a process is flawed. This is why the court is clothed with a wide discretion to set aside or vary judgments or decrees but such discretion must be exercised to ensure that justice is served for both parties.
32. This discretion is not designed to assist a party who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice as was held in the case of *Shah v Mbogo & Another* (1967) EA 116 at page 123 by Harris J and as approved by the Court of Appeal for East Africa in *Mbogo v Shah* (1968) EA 93).
33. In the case of *Patel v EA Cargo Handling Services Ltd* (1974) EA (Supra) the court held that;-

“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 it by the rules. I agree that where is it is a regular judgment as is the case here the Court will not usually set aside the judgment unless it is satisfied that there is a defence on the merit. In this respect defence on 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”.
34. The issue whether the judgment of this court is regular or irregular, in the case of *James Kanyitta Nderitu & Another Versus Marios Philotas Ghikas & Another*, Civil Appeal No 6 of 2015 eKLR the Court of Appeal held that ; -

“In a regular default Judgment, the defendant will have been duly served with Summons to Enter Appearance, but for one reason or another, he had failed to enter appearance or to file defence resulting in default Judgment. Such a defendant is entitled under Order 10 Rule 11 of the *Civil Procedure Rules*, to move the Court to set aside the default Judgment and to grant him leave to defend the suit. In such a scenario, the Court has unfettered discretion in determining whether or not to set aside the default Judgment and will take into account such factors as the reason for the failure of the defendant to file his Memorandum of Appearance or defence, as the case may be, the length of time that has elapsed since the default Judgment was entered, whether the intended defence raises triable issues, the respective prejudice each



party is likely to suffer, whether on the whole it is in the interest of justice to set aside the default Judgment, among others.”

35. In this case the Defendant faults the mode of service that the postal address did not belong to them hence did not receive the Originating Summons. The Defendant gave an explanation to that effect. This explanation of having used the postal address for purposes of registration and not for use might not hold any weight as parties are allowed to change their particulars at the Companies Registry when such changes occur as a company must have a postal and physical address.

36. Therefore, this would amount to proper service but the court would still set aside an *ex parte* judgment on grounds other than non-service of summons as was held in the case of *Kingsway Tyres And Automart v Rafiki Enterprises Ltd* Ca Civil Appeal No 220 Of 1995 where Court held that :-

“To our minds, the onus was on the Respondent to fault the service. Having failed to do so, and in the absence of evidence on record to lead us to hold that the service was improper, it is our view and so hold that that the *ex parte* Judgment was a regular Judgment. It would only, if at all, be properly vacated on grounds other than non-service of summons. There are ample authorities to the effect that notwithstanding regularity of it, a Court may set aside an *ex-parte* Judgment if a defendant shows he has a reasonable defence on the merits.”

37. In this case, the draft replying affidavit shows that the Applicant has a defence with triable issues which the court cannot ignore and deny the Applicant an opportunity to be heard. The Applicant has given good and substantial reasons why the *ex – parte* judgment should be set aside as was held in the case of *Departed Aseans Property Custodian Board v Issa Bakuya* the Supreme Court of Uganda in Civil Appeal No 18 of 1991 that: -

“An application to set aside an *ex-parte* Judgment cannot succeed if no good or substantial reasons are given to justify the setting it aside.”

38. On the issue of stay of execution, the Applicant admitted that the same has been overtaken by events as a title had been issued to the Plaintiff but faulted the process as it was issued three days after the 2nd and 3rd Respondents put a Gazette Notice for any objections to file the same within 30 days.

39. Courts do not give orders in vain but in this case the setting aside of an *ex parte* judgment would be able to set aside the decree that gave life to the issuance of that title and all other consequential orders or actions null and void.

40. I have considered the application, the draft defence, the submissions by counsel and order that the judgment delivered on December 2, 2021 is hereby set aside and all the consequential decrees thereof. The 1st Defendant to file a defence/ replying affidavit with within 14 days from the date of this ruling. The 1st Defendant to pay thrown away costs of Kshs 60, 000/- within the next 30 days, failure to which this order lapses. Costs in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF MARCH, 2023

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

