Bokuti v Ngonya (Environment & Land Case 596 of 2016)
[2023] KEELC 17190 (KLR) (4 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17190 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND CASE 596 OF 2016

M SILA, J

MAY 4, 2023

BETWEEN

PHILIP SAWE ARAP BOKUTI ..... PLAINTIFF

AND

JAMES NGONYA ..... DEFENDANT

(Application to set aside judgment; applicant asserting that he was never served with summons; there being an affidavit of service on record but the same not indicating the time of service as required by Order 5 Rule 15; any defect in an affidavit of service must be construed in favour of the other party; court not persuaded that there is adequate proof of service of summons and judgment set aside ex debito justitiae)

RULING

1. The application before me is that dated December 13, 2022 filed by the defendant. It seeks the following orders :-

    1. Spent (certification of urgency).

    2. That this Honourable Court do grant leave to the firm of Shira & Company Advocates to come on record for the defendant/applicant after judgment.

    3. That this Honourable Court do order for stay of execution of the *ex parte* judgment delivered on April 19, 2013 and/or warrants of arrest dated July 27, 2022 and all other subsequent proceedings and/or consequential orders pending hearing and determination of this application inter partes.

    4. (same as prayer 3 above word for coma).

    5. That this Honourable Court do extend and enlarge time to allow the defendant/applicant to file their Statement of Defence out of time.

6. That the defendant/applicant be at liberty to apply for such further or other orders and/or directions as the court may deem fit and just to grant in the circumstances.

7. That the costs of this application be provided for.

2. The application is supported by the affidavit of the applicant. He has deposed that he realized that the respondent had filed this suit when he was made aware of warrants of his arrest regarding a decree dated April 26, 2013. He deposes that he was never served with any notice in respect of the suit and that executing the warrants will cause him injustice. He requests that the process server who effected service be summoned for verification of his averments. He contends that he has a meritorious defence which ought to be heard and he has annexed a draft statement of defence.

3. The application is opposed by the replying affidavit of the plaintiff. He deposes that he filed suit through a plaint dated August 23, 2011 seeking a declaration that he is the owner of the land parcel Transmara/Mayoi/41 and an order to permanently restrain the applicant from the said land; that summons were served upon the applicant on November 2, 2011 and proof of service was filed in court; that the applicant failed to enter appearance; that the matter proceeded for formal proof on February 6, 2013 and judgment was delivered on April 19, 2013 in his favour; that since 2013, the judgment has never been challenged and he exercised his rights according to the judgment; that he filed a bill of costs which was taxed and certificate of costs issued on February 26, 2014; that he applied to execute the decree and notice to show cause was issued to the applicant which was served; that despite service, the applicant failed to appear in court and warrants for his arrest was issued; that since issue of the warrants the applicant has been on the run; that the applicant has used his position as Chief to oppress him and has continued to harass his family forcing them to live elsewhere; that his failure to move court for over 10 years is an abuse of the court process; that the applicant is Chief of their village and was served but trashed the documents as useless pieces of paper; that the applicant is feigning ignorance as they had a meeting at the Land Registrar's office Kilgoris with a view to have the land partitioned in accordance with the decree but the applicant wanted a lion's share of the property and refused to share the property as decreed; that in the grounds in support of his application, the applicant has admitted to not having any interest in the property and there would be no use to go through another trial; that the applicant has no arguable defence; that there is no loss that the applicant will suffer; that the delay of 10 years is not adequately explained.

4. The applicant filed a supplementary affidavit. Inter alia, he deposed that he has no interest whatsoever in the suit property and at no point has he ever claimed to have an interest in it; that he has never been in occupation of the property or registered any form of inhibition or restriction and the suit against him was instituted in bad faith; that he was never served with summons and could not have known of the case against him; that he only came to know about the suit when he was served with warrants of arrest on December 8, 2022; that he has not been on the run; that he retired from service in the year 2017 and has never interacted with the plaintiff; that he has never attended a meeting between himself and the plaintiff ; that if he is not heard, he stands to be arrested and his properties auctioned in recovery of costs.

5. I directed both counsel for the applicant and the respondent to file submissions which they both did and I have taken the same into account. I have also gone through the record of the court.

6. I observe that this suit was commenced through a plaint which was filed on October 5, 2011. In the plaint, the respondent pleaded that in the year 2001, one Kekuta Ole Morijo and himself, got registered as joint proprietors of the land parcel Transmara/Moyoi/41 measuring 103.55 Ha (the suit land) after an adjudication process. He averred that he had been in possession of the land prior to the adjudication process and that Kekuta lived elsewhere with his family; that Kekuta subsequently died

and the suit land wholly vested in him ; that in the year 2001, the applicant caused a restriction to be registered on the land claiming that he (plaintiff) had been registered as joint owner fraudulently; that on August 11, 2011, the applicant brought his agents and servants into the land and started preventing the respondent from using it. In the suit, he sought a declaration that he is the sole owner of the land; an order of permanent injunction against the applicant; an order to remove all restrictions and inhibitions registered; costs, interest and any additional relief the court may deem just to grant. There is an affidavit of service sworn on November 15, 2011 by Justus Orondo, a process server. In it, it is deposed that he duly served the applicant on November 2, 2011. No appearance was entered and the matter proceeded ex parte before Okong'o J, who delivered judgment on April 19, 2013. On the issue of ownership, the learned judge was of opinion that there was no indication that the property was jointly owned and only declared that the respondent owns half undivided share of the suit land. He otherwise issued an order of permanent injunction against the applicant, ordered the removal of the restrictions placed against the title, and awarded the respondent costs of the suit. Costs were taxed at Kshs 118,781.00 and I have seen a certificate of costs dated February 26, 2014. The respondent moved to execute the costs and had warrants of arrest issued against the applicant. It is then that the applicant filed the present application.

7. There is a prayer in the application to allow the applicant's law firm to come on record after judgment. In my opinion, that prayer is unnecessary as there is no change of advocate being effected and therefore Order 9 rule 9 does not apply. The applicant is at liberty to appoint any counsel to act for him without seeking an order to that effect. The gist of the application is that the applicant was never served with summons and/or notices and only came to know of the case after being made aware of the warrant of arrest. My further perusal of the record shows that after the affidavit of service was filed, the respondent sought for interlocutory judgment to be entered. Interlocutory judgment was not entered, rightfully so, as the matter was neither a liquidated claim (under Order 10 Rule 1) nor a suit for pecuniary damages (under Order 10 Rule 6) which are the two categories of suits for which interlocutory judgment may be entered. The direction given was for the matter to be fixed for hearing. What it means is that the matter proceeded under Order 10 Rule 9 which provides as follows :

> 9. General rule where no appearance entered
>
> Subject to Rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.

8. I observe that when the matter proceeded for hearing on February 6, 2013, it was stated, wrongly so, that the matter was coming up for formal proof, when in fact it was coming up for full hearing under Order 10 Rule 9. Just like any other full hearing, the defendant needed to be served with a hearing notice. Unfortunately, I have seen no hearing notice on record, and it has not been offered that the applicant was ever served with a hearing notice. I have also seen no evidence whatsoever, that the applicant was ever served with the notice for taxation of costs. In addition, given that the applicant did not enter appearance, he needed to be served with a notice of entry of judgment pursuant to Order 22 Rule 6 before execution of the decree. I have seen no evidence of such notice nor any evidence of service of such notice.

9. As to whether the applicant was served with summons, this is what the affidavit of service states where relevant :

> 3 That on November 2, 2011 I traveled to the home of the said defendant next to Lolgorian Trading Centre where I duly served the said James Ngonya who accepted service by retaining copies in acknowledgment but refused to sign that he is a stranger to the matters herein.
>
> 5 That the said James Ngonya was pointed out to me by David Ngetich a boda boda at Lolgorian Trading Centre who knew the said defendant since the defendant is the area Chief.

10. I am not persuaded that the said affidavit complied with the provisions of Order 5 Rule 15 which provides as follows :-

> 15. 1 The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.

11. The affidavit of service does not state the time that the summons were allegedly served and is therefore not in compliance with Order 5 Rule 15. It would also have been useful for the process server to give details of the home, how he gained entry therein, how he introduced himself to the applicant, who else was present in the home (e g family members) and such other details within his affidavit of service so as to give credence to the same. However, what remains important to me is that the time of service was not indicated. Where an affidavit of service is contested, any deficiency in the said affidavit will need to be construed in favour of the person objecting to service. In this instance, the defect in the affidavit will need to be in favour of the applicant herein.

12. The effect is that the defendant has persuaded this court that he is entitled to the setting aside of the judgment *ex debito justitiae*, i e as a matter of right. In addition to the above, I have already pointed out that there was non-service of notice of hearing, the taxation notice, and the notice of entry of judgment. The execution process was also defective. I am therefore persuaded to set aside all processes subsequent to the judgement including the taxation of costs and the warrant of attachment.

13. I am alive to the claim by the respondent that the applicant has been aware of the judgment and that they even met at the office of the Land Registrar, Kilgoris. This was denied by the applicant in his supplementary affidavit. It would probably have helped the respondent if he had provided the exact date and time of the meeting, or presented an affidavit from the Land Registrar. These were not given and in absence thereof, there is no proof that the applicant ever had a meeting with the respondent. In as much as there has been significant time lapse from the date of the judgment, the applicant has demonstrated that he could not have filed any documents at an earlier period for not being aware of the suit. The respondent cannot therefore benefit from the time lapse.

14. The long and short of the above is that I am persuaded to set aside the judgment and all subsequent and consequential orders, which I hereby do. I direct the applicant to proceed and file defence within the next 14 days. I will give further directions once pleadings close.

15. On costs, the applicant will have the costs of this application.

16. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 4TH DAY OF MAY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII