S v A & another (Environment & Land Case 376 of 2014)
[2023] KEELC 17321 (KLR) (9 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17321 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ENVIRONMENT & LAND CASE 376 OF 2014

DO OHUNGO, J

MAY 9, 2023

BETWEEN

SMS ..... PLAINTIFF

AND

RA ..... 1ST DEFENDANT

ML ..... 2ND DEFENDANT

RULING

1. Judgment in this matter was delivered on October 24, 2018 in favour of the plaintiff as follows:

    1. A declaration that the plaintiff/applicant is the owner of the portion of land parcel No. LP N/maragoli/viyalo/xxxx and Kak/viyalo/xxxx being a subdivision of LP N/maragoli/viyalo/xxxx having lived on, occupied and used the said parcel of land from xxxx to-date and the applicant is hence entitled to the said portion of land by virtue of adverse possession and the respondent is ordered to transfer title to the said parcel of land to the applicant.

    2. A declaration that the respondents are is holding title to land parcel No. LP N/maragoli/viyalo/xxxx and Kak/viyalo/xxxx being a subdivision of LP N/maragoli/viyalo/xxxx in trust for the applicant and the respondents are ordered to transfer title to the said portion of land to the applicant and in default of the respondents transferring the same voluntarily the Deputy Registrar to execute all the documents necessary to effect the transfer of title to the aforesaid parcel of land into the name of the applicant.

    3. The respondents to pay the costs of this originating summons to the applicant.

2. Following delivery of the judgment, the court ordered on March 12, 2020 that the defendants be evicted from the suit properties and that their structures thereon be demolished. As is evident from a ruling delivered in this matter on January 18, 2022, the orders of March 12, 2020 were enforced.

3. On September 21, 2022, the applicants herein MV, JK, EM and JM, who collectively referred to themselves as "Interested Parties," filed Notice of Motion dated September 21, 2022 which is the subject of this ruling. The following orders are sought in the application:

    1. [Spent]

    2. That the ex parte proceedings and judgment be set aside.

    3. That the second interested party be appointed as the legal guardian for HO who is mentally disable for purposes of this suit.

    4. That this court directs that the main suit be heard afresh and the applicant be allowed to defend the suit unconditionally.

    5. That stay of eviction orders be issued in this matter pending fresh hearing and determination of the main suit.

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

    7. That any other orders issue that meets the end of justice.

4. The application is supported by an affidavit sworn by the first applicant who deposed that the respondent misdirected this court through concealment of material facts and filing of false affidavit of service leading to judgment being issued in his favour. That the respondent substituted the deponent's late father with a stranger and or a wrong party thereby misdirecting this court to issue adverse orders against the interested parties who were condemned unheard since the respondent never effected service upon any of the deceased's family members. She further deposed that she was never served with any pleadings in respect of the suit herein as enclosed in the affidavits of service on record after the deceased's demise. That after the death of her father, an application for substitution ought to have been made subject to the *Mental Health Act* to ensure justice for the first applicant's brother who was residing in the suit property but was suffering from mental disorder. She concluded by deposing that this court ought to determine the statement of defence on record filed by the deceased since it raises triable issues and further deposed that all service effected after the deceased's demise are irregular and defective.

5. In response, a replying affidavit sworn by the plaintiff was filed. He deposed that it is not true that he substituted the deceased with a wrong party since the second defendant herein Mary Lungahi and the first interested party MV are the same person and that on February 8, 2012, this court substituted ML in place of her deceased father one JMS and that at all material times, the first applicant was properly served and return of service filed in court thereafter. He therefore prayed that the application be dismissed to allow him to enjoy the fruits of judgment in his favour. That in any event, the applicant's brother HO has his alternative land where he stays with his family.

6. The application was canvassed through written submissions.

7. The applicants argued that the respondent without any colour of right wrongly instituted this suit against them and that despite failure of being accorded an opportunity to be heard in a suit filed against their deceased father over land parcel No. N/Maragoli/Viyalo/xxxx (suit property), the court proceeded to issue an ex-parte judgment in favour of the plaintiff. Arguing that they should not be condemned unheard and that affidavits of service are false, they relied on *Mureithi Charles & another v Jacob Atina Nyagesuka* [2022] eKLR. They further submitted that the substituted party is a stranger and that they were never involved in this suit, yet it directly touched on their father's property. The applicants therefore submitted urged the court to allow the application.

8. In his rejoinder, the plaintiff submitted that the judgment herein is not an ex-parte one since the first defendant RA participated in the proceedings and testified. The plaintiff further submitted that the application has been brought after an inordinate delay and that the second, third and fourth applicants were not parties to this suit hence their prayers to be enjoined in an already concluded case whose decree has already been effected should not be entertained.

9. I have considered the application, the affidavits, and the submissions. While considering an application such as the present one, the court is called upon to apply the principles laid down in *Mbogoh & another v. Shah* [1968] EA 93 and reiterated in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR as follows:

> From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. 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. ... In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment ...
>
> In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right.

10. As correctly pointed out by the plaintiff, the record shows that the first defendant participated in the hearing and even testified. Thus, the issue of not being aware of the proceedings does not arise as far as the first defendant is concerned. As regards MV who is the first applicant in the application before the court, I note that when she attended court on October 12, 2022, she told the court that her name was wrongly captured during substitution as mentally. She is essentially one and the same person as the second defendant. The only complaints she seems to have is that her name was not captured correctly and that she was not served. Nothing much turns on the issue of her name since she is in court and confirms that she is the one referred to.

11. Regarding the question of service, I note that the second to fourth applicants are not parties to the matter. They were not parties as at the date of hearing and determination of the suit. There was thus no requirement to serve them since they were not parties. The matter having been concluded, they cannot now join it at this stage. As for the first applicant, Mary Vihenda, I have perused material on record, and I am satisfied that she was served. She, just like RA, came into the matter on February 8, 2012 by way of substitution following the demise of the initial defendants. She substituted JMS who had participated in the proceedings by filing a notice of appointment of advocates on July 28, 2008. Among others, there is an affidavit of service sworn by Paul Oketch on October 30, 2017 which confirms that she was served with hearing notice in respect of the hearing scheduled for November 1, 2017. The circumstances of service are clearly spelt out in the said affidavit. There is yet another affidavit of service sworn by the same Paul Oketch on February 15, 2018 which confirms that she was served with hearing notice in respect of the hearing scheduled for February 28, 2018.

12. As noted earlier, among the orders that have been issued and enforced in this matter following delivery of the judgment are eviction of the defendants from the suit properties and demolition of their structures. All that could not have taken place without the knowledge of the real parties to the case. Additionally, judgment in this matter was delivered on October 24, 2018 while the present application was filed on September 21, 2022, after a delay of almost 4 years. I find that the delay is inordinate.

13. The prayer seeking appointment of a guardian of under *Mental Health Act* should be made before the court with jurisdiction in such matters.

14. In view of the foregoing, I find no merit in Notice of Motion dated 21st September 202. I dismiss the application with costs to the plaintiff.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 9TH DAY OF MAY 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Aligula holding brief for Mr Wekesa for the applicants

The Plaintiff in person

The first defendant in person

The second defendant in person

Court Assistant: E. Juma