Wanyonyi v Nyongesa & 6 others (Environment & Land Case 2 of 2023) [2023] KEELC 17347 (KLR) (4 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17347 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 2 OF 2023

FO NYAGAKA, J

MAY 4, 2023

BETWEEN

HENRY MWASAME WANYONYI ..... PLAINTIFF

AND

PETER NYONGESA ..... 1ST DEFENDANT

JOHN WAFULA ..... 2ND DEFENDANT

MARY NANJALA ..... 3RD DEFENDANT

MOSES WEKESA ALIAS ACRE NANE ..... 4TH DEFENDANT

MANAYSI KISEMBE ..... 5TH DEFENDANT

SAMUEL BUNYASI ..... 6TH DEFENDANT

DAVID KISEMBE NYONGESA ..... 7TH DEFENDANT

RULING

1. Before me is a strange application! I call it strange because this matter came up for hearing today, for the second time but the court pointed out that for the reason that service of summons to enter appearance and the hearing notice was in doubt and not in accordance with Order 5 of the Civil Procedure Rules, it had to be done again. It was upon that remark and view that learned counsel turned passionate about convincing the court to proceed with the hearing. With that assistance being openly displayed in court at the hearing of the plaintiff and the entire filled court it was incumbent that the court makes a detailed and well reasoned ruling.

2. The background of the application before me is that this suit was filed on 25/01/2023. On 01/03/2023 when the same was fixed before me for mention, learned counsel for the plaintiff appeared online and urged the court that it orders the defendants to be evicted from the suit land since they had been served

but had failed to enter appearance and defence. The court, apart from silently noting from the record that compliance with Order 11 of the Civil Procedure Rules and the Practice Directions of the court (ELC) was given vide Gazette Notice No. 5178 of 25/07/2014 had not been made, noted that the matter was for mention on the material date. As such it directed that substantive orders could not issue and more so that for eviction orders to issue there was need for evidence to be adduced. It thus directed the learned counsel to take a date in the Registry after compliance.

3. Strangely, the plaintiff moved the Registry three days later, through another learned counsel who held his brief in the Registry process, to fix the suit for hearing the following week, only four days from the date of fixing. It was urged on 08/03/2023 that the hearing notice for that date was drawn when the date was fixed and learned counsel himself travelled all the way from Nairobi that evening and went and served the notices on each of the defendants in Kiminini area of Western Kenya. But when the court scrutinized the alleged service evidenced by the affidavit of service filed by counsel, it doubted it because, first, the hearing date was indicated as having been taken on 04/03/2023 and yet service was alleged to have been effected on 03/03/023, which was a day before fixing the hearing date. Learned counsel argued on that date that it was a typing error and that the date of service could have been the 04/03/2023. That still did not add up. Secondly, none of the parties accepted service, though the law provides for that possibility. Third, the affidavit of service did not indicate satisfactorily how the learned counsel identified each of the defendants. Moreover, it was a bit puzzling, although it is possible, that it was learned counsel who personally effected service deep in the rural area of Western Kenya, not once this time but even on the earlier occasion when summons were allegedly served. Fourth, the learned counsel for the plaintiff had on 03/03/2023 used the same affidavit of service which the court had on 01/03/2023 found defective to make a request for default judgment to be endorsed against all the defendants for failure to enter appearance and file defence. All the above notwithstanding learned counsel insisted on proceeding with hearing and above all notwithstanding that the service for the hearing date was a period short not only for a conventional hearing but also for the close of pleadings. The court directed that the suit be adjourned and that service of summons to enter appearance and defence and a hearing notice be effected through the area chief wherein the suit land lay. The court fixed the suit for hearing on a fair off date, being 04/05/2023, to allow that to be done and pleadings to close if service was effected immediately after the adjournment.

4. With that background in mind, the suit came up for hearing on 04/05/2023. The plaintiff had filed an affidavit of service in the morning and was raving to go on with the hearing. The affidavit of service detailed the service which one John Mutara did on 16/03/2023. Of relevance was paragraph 6 in which he stated that an area sub-chief of the locality where the defendants hailed from was called to the chief's office and he stated that he knew the defendants. At paragraph 7 he swore that the said sub-chief, named one Mr. Khaemba received the summons to enter appearance and the hearing notice and stamped on each of the copies that he, the process server, then returned to court duly served.

5. The court examined carefully each of the annexed copies and indeed they bore the stamp and signature of the assistant chief, Nabiswa sublocation. The court was of the view that that was not proper service on the defendants. It was that finding of the court that elicited the instant application. Learned counsel was passionate, and at times furious, when submitting that his client be heard on the material date. He argued that the service was proper and the matter should proceed to hearing. He lamented that by the rejecting the services already effected, including the instant one, it was expensing his client on the matter. He stated that this was the third time the suit was coming up for hearing and possibly to be adjourned. He contended that on all occasions he had travelled from Nairobi and that it was expensive to do so. He also argued that his client was old and should be heard. He stated that he strongly believed that the pleadings and the hearing notice had been effected by the area sub-chief but the defendants had deliberately failed to attend court. He then made an interesting argument, that the suit should

proceed to hearing, judgment be entered against the defendants and if any one of them protested, then the area sub-chief would be summoned to be examined as to whether he effected the further service of the documents left with him. He urged the court to rely on article 159 of *the Constitution* of Kenya, 2010, Section 1A and 1B of the *Civil Procedure Act* and Section 3 of the *Environment and Land Court Act* so as to facilitate a quick and just expeditions disposition of the suit by letting the same to be heard as prayed. He asked the court to grant the plaintiff an opportunity to be heard. He then submitted that the reason the defendants did not attend court is that the 4th one informed him when he served him the previous time "he would not come to court and there is nothing the court would do". He summed it that to save judicial time and resources the matter should be heard. Lastly, he argued that if the same was adjourned then the plaintiff should be given only 7 days to serve and the court directs which mode of service would be acceptable to it.

6. Upon listening to the submissions by leaned counsel, it is vital to correct the notion that this court has preferred mode of service of documents. Service of documents, whether summons to enter appearance or hearing notices or other process on parties is a legal requirement whose procedure and conditions to be fulfilled thereto.

Determination

7. I have considered the application before me. I have given due thought and analysis of the law and facts in issue herein. The only issue for determination is whether or not service herein, as purportedly effected on 16/03/2023 was proper or not, that is to say, whether it complied with order 5 of the *Civil Procedure Rules*. The importance of proper service of summons to enter appearance and hearing notices or other notices on parties cannot be gainsaid. Notification of a party of the proceedings likely to be taken against him or her is the basis of a strong democracy and the continued never-failing principle of natural justice: that a person should not be condemned unheard.

8. As was stated in the *Management of Committee of Mukono Primary School and Another -vs- Uganda Examination Board*, HC Civil Misc. Appl. No. 18 of 2010:

> " it is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and any law that contravenes or offends against any of the rule of natural justice, is null and void and of not effect".

9. See also the case of *Egal Mohammed Osman -vs- Inspector General of Police & 3 others* [2015] eKLR. In *Msagha -vs- Chief Justice & 7 Others,* Nairobi HCMCA No. 162 of 2004 (Weldon, Lesiit and Emukule JDD on 03/11/2006) (HCK) 2 KLR 553, it was held that:

> " the court observes firstly that the rules of natural justice "audi alteram patem", hear the other party, on no man/woman may be condemned unheard are deeply rooted in the English Common Law have been transplanted by reason of colonization of the globe during the hey-days of the British Empire."

10. This turns me to our Constitution 2010. Article 25 provides for non- derogable fundamental rights and freedoms. One of them is the "right to unfair trial" as provided for under Article 25(c). This right has its sister "fair hearing" which is provided for under Article 50 of which for Civil Matter Article 50 (1) is key. These two rights carry with them the rule of natural justice that a party cannot be condemned unheard. It goes without saying that in interpreting *the Constitution* holistically so as to give it a progressive and living meaning, Article 159 of the same document cannot be interpreted

and applied to mean and imply that a party who is not served with summons to enter appearance or a hearing notice be denied the opportunity to be heard by being indirectly condemned unheard. In the contrary the Article (159) speaks to the fact and position in law and a party not served should be heard by first being served and that where there is a semblance of or any little doubt about lack of service, the said Article should be used to cure the technicality in favour of the party being given chance to be heard by being serve with process, enter summons or enter appearance or a hearing notice. That is why whenever courts are faced with applications for setting aside irregular judgments or orders, they have been clear on the way forward, and been firm at that: such judgments or orders are set aside ex debito justitiae, which means as a matter of right. What that means is that all the applicant needs to show is that he/she was not served and the court, shall have no discretion to exercise in the circumstances. Failure of service on a party immediately restricts the discretion of a court to nil. Thus, no court or party can justify the continued existence of a judgment or order obtained by a party or situations where it is clear that service was not effected prior to that. And for clarify purposes, irregular judgments or orders are defined as those which are made absent of service of process. It means that the threshold of setting aside such a judgement or order is quite low, so low to the extent of it being a mandatory duty of the court to do so. This is because the rules of natural justice are so weighty or heavy upon mankind that it is impossible to wriggle out of them unless dignity and reason have been thrown out of the window. Even when that happens it destroys the very basis of the rule of law, and also sets the one in breach on a trajectory of acting against the divine will of the creator of the universe.

11. There is a plethora of decisions on the principles of setting aside irregular judgments. In *James Kanyita Nderitu & Another -vs- Marios Philotas Ghikas & Another* [2016] eKLR, it was held that if there is no proper service of summons to enter appearance the resulting judgment entered in default is set aside ex-debito justitiae and that means the court is under a duty to do so in order to uphold the integrity of the judicial process.

12. In *Patrick Omondi Opiyo T/A Dallas Pub -vs- Sliaban Keah & Another* [2018] eKLR, the Court of Appeal held that service of summons accords the sued party an opportunity to be heard before any orders are issued against him/her. It held further that that is the essence of the rules of natural justice and if judgment is entered against a party who is not served, the said judgment ought to be set aside ex-debito justitiae and that differs from where a party is served but does not appear.

13. In *Kwanza Estates Ltd -vs- Dubai Bank Ltd (in liquidation) & 2 Others* [2019] eKLR, the Court of Appeal was in agreement with the decision of the Superior Court when it held that the request for the default judgment was premature, irregular and overtly untenable, and that where such facts present themselves to a court it has no discretion to exercise since the judgment stems from a nullity and must be set aside ex-debito justitiae.

14. The list is endless. Now, as regards the instant case the learned counsel, either as a result of desperation for convincing his client that he has acted for him and won, or due to shear misunderstanding or misreading of the law wants this court to ignore the clear rules as to service. Order 5 Rule 6 provides for the mode of delivery of service of summons to enter appearance, and it is that it is done in duplicate form. Order 5 rule 7 is on service of summons on several defendants (as in the instant case). The rule is that except where it is prescribed otherwise, and this may be for instance, through advertisement, service ought to be on each of the defendants. Order 5 Rule 8 provides further that the service be in person or through an agent who is empowered to accept service. Order 5 Rule 10 provides for service through a manager or agent of a person who is engaged in a business if the suit is in relation to the business but there has to be proof that the owner does not reside within the local limits of the court issuing the summons. Of last note in relation to service on individuals is that Order 5 Rule 12 provides for service on an adult member of the family of the defendant in that behalf. But the condition

precedent thereto is that the plaintiff must show that he made several reasonable attempts to serve the defendant or his authorized agent but failed. This goes also for service of hearing notices.

15. In the instant case, the plaintiff has not brought himself within the exceptions the above Rules provide for in terms of service. Learned counsel only argues that he has served the defendants but they have failed to appear. He has the courage to even argue that the two purported services prior to the one allegedly done on the area sub-chief, were good service while the court re-looked at them earlier and found them wanting. As such he argues that his client has spent a lot of money on this issue. My answer to that last argument is that if a party uses his money on a nullity he has himself to blame. It does not matter how many time or how much money he uses.

16. Turning to the argument by the plaintiff through counsel that the court can and should proceed with the hearing and want to see if the judgment entered by that would be challenged or set aside, I have not come across an unreasonable submission as this and I pray none ever comes up again in any court. Courts are not robots: even robots of this day use artificial intelligence to do things! Courts are not rubber stamps of parties' ill and malpractices in society. They cannot sit and see an injustice being perpetrated through them and they do nothing just because our legal system is that of common law where they must sit passively and make decisions afterwards. It is the duty of the court to do justice. While the court, should not descend into the arena of the parties and actively lead them in the manner they conduct their matter, they should, under duty and law, ensure that the rules of the "game" are level and even. They cannot close their eyes to technicalities being used to perpetrate an injustice, otherwise that would be a mockery of the law and justice. Thus, it should be clear to the plaintiff herein that service of the summons to enter appearance or the hearing notice herein is not a choice for him to make, and it is not a technicality such that he acts as though Article 159 of *the Constitution* will ever come to his aid. This court cannot proceed with the hearing herein today as though service was ever effected on the defendants. It should also be clear to him that if he does not service the summons to enter appearance again, and within the 30 days that Order 5 Rule 1(6) of the Civil Procedure Rules provides for, this court shall proceed to find the suit to have abated, unless extension of the summons is prayed for as provided by law.

17. Lastly, when learned counsel urges that Section 1A and 1B of the *Civil Procedure Act* apply so that he proceeds with the hearing, this court finds the argument untenable. Section 1A provides for the overriding objective of this court and Section 1B for the duty of the court to expedite the justice of this case and indeed any other matter in an efficient and proportionate manner. Section 2 of the Environment and Land Court which he called to his aid speak to the latter provision above. I do not see how the three provisions will ever route out an everlasting principle of both the universe and law that a party should never be condemned unheard.

18. Respectfully, this court shall not be swayed into hearing a party in absence of the one he has accused unless he has notified that other of the existence of the accusation and the date such accusation shall be heard. This court cannot put the cart before the horse and pretend to be pushing forward the wheels of justice. That would be a waste of the precious time allotted to the court and parties.

19. Thus, I dismiss the application, with costs, if ever they will be found due. I direct that the plaintiff pays Court Adjournment Fees before the next mention date, which this court fixes on 31/05/2023, for purpose of confirming if service of summons to enter appearance shall have been served, and a trial bundle filed by the plaintiff in readiness for taking directions as provided for under Order 11 of the *Civil Procedure Rules.* The affidavit of service to show that the summons shall have been served to be filed at least 7 days to the mention date.

20. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 4TH DAY OF MAY, 2023.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE

In the presence of:

Mr. Michael Were Advocate for Plaintiff.