



Oloo v Otiemo & 3 others (2ND, 3RD & 4TH Defendants sued as the legal representatives of JAMES ODHIAMBO OTIENO(Deceased)) (Environment & Land Case 43 of 2018) [2023] KEELC 18577 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18577 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 43 OF 2018**

E ASATI, J

JULY 6, 2023

**IN THE MATTER OF: AN APPLICATION FOR DECLARATION OF
EXTINCTION OF THE INTERESTS AND RIGHTS REGISTERED
PROPRIETORS AND PERSONAL REPRESENTATIVES OF JAMES
ODHIAMBO OTIENG (DECEASED) AND BELDINA WAYUDI OTIENO
IN ALL THAT PARCEL OF LAND KOWN AS EAST GEM/URANGA/386
AND REGISTRATION OF THE SAME IN THE NAME OF THE
PLAINTIFF/APPLICANT**

BETWEEN

HEZRON NAMAN OLOO PLAINTIFF

AND

BELDINA WAYODI OTIENO 1ST DEFENDANT

KENNEDY OCHIENG ODHIAMBO 2ND DEFENDANT

MAGARET OSIGA 3RD DEFENDANT

JULIA ARWA 4TH DEFENDANT

**2ND, 3RD & 4TH DEFENDANTS SUED AS THE LEGAL REPRESENTATIVES
OF JAMES ODHIAMBO OTIENO(DECEASED)**

RULING

1. This ruling is in respect of the Notice of Motion Application dated April 28, 2022 and filed in court on May 5, 2022. It is stated to be brought pursuant to the provisions of Order 10 Rule 11, Order 51 Rule



- 1 of the Civil procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act. The application seeks for an order that the judgement and decree issued in this matter be set aside and the 2nd, 3rd and 4th Defendants be given leave to defend the suit. The grounds upon which the application was brought were that the 2nd, 3rd and 4th Defendants were not served with Summons to Enter Appearance, that they have been condemned unheard and that they have a good defence and that it is in the interest of justice that the orders sought be granted. The application was supported by the averments in the Supporting Affidavit sworn by the 2nd Defendant on April 28, 2022.
2. The application was opposed *vide* the grounds of opposition dated June 6, 2022 filed by Maxwell O Ogonda Associates, Advocates on behalf of the Plaintiff. The grounds are that the application is misconceived, misdirected, frivolous, vexatious and an abuse of the court process. That the application is made in bad faith and the applicants are guilty of laches. That prayer 2 of the application has been overtaken by events. That the applicants have not annexed any draft Statement of defence to enable the court determine whether they raise any triable issues to warrant the setting aside of lawful court orders. That the 2nd applicant has not demonstrated any authority granted to him to act on behalf of the 3rd and 4th Defendants. That the application is a mere afterthought and meant to delay justice on the part of the Plaintiff. That the only interest the application can protect are those of the 3rd Defendant which interests have since abated. Counsel prayed that the application be dismissed.
 3. The application was argued by way of written submissions. The applicants filed written submissions dated April 14, 2023 on the April 17, 2023 through the firm of Ochieng Oguttu Advocates acting for them. Counsel submitted that there was lack of service of Summons to Enter Appearance. That the process server who was cross-examined on the contents of his Affidavit of service did not have the full name of the motor cycle rider who allegedly took him to the 3rd and 4th Defendants' homestead. That he did not have the motor cycle registration number of the motor cycle he allegedly used to go to the 3rd and 4th Defendant's homestead as alleged. That the telephone number indicated in the Affidavit does not belong to the 2nd Defendant.
 4. Relying on the case of Gulf Fabricators vs County Government of Siaya (2020) eKLR Counsel submitted that service of Summons to Enter Appearance is crucial. That since Summons to Enter Appearance were not served on the applicants the ensuing judgement and decree were irregular. Relying on the cases of Mwala vs Kenya Bureau of standards EA LR [2001] 1 EA 148 where it was held that court should set aside irregular judgement as a matter of right not discretion and Ali Bin Khamis vs Salim Khamis Korobe & 2 others [1956] 23 EACA 195 where it was held that an order made without service of Summons is a nullity which must be set aside *ex debito justitiae*, Counsel submitted that the court should hold that the judgement entered herein was irregular and set the same aside.
 5. Counsel further submitted that the Defendants have a defence that raises triable issues namely; that the Defendants are administrators of the estate of one James Williams Odhiambo Otieng'Okwama in whose name the suit property was registered jointly with the 1st Defendant as tenants in common with ½ share each. That all these details are in the Supporting Affidavit. That the right to be heard is enshrined in articles 47 and 50 of the Constitution of Kenya 2010 and a party should not be condemned unheard.
 6. Written submissions dated May 16, 2023 were filed by the firm of Maxwell O Ogonda & Associates, Advocates on behalf of the Plaintiff/Respondent. Counsel submitted that the 1st Defendant entered into a consent judgement with the Plaintiff on September 2, 2020 and that the court should not interfere with the judgement because it is regular and legal.



7. On whether the applicants were served with Summons to Enter Appearance, Counsel submitted that the Affidavit of service filed by the process server by the name Julius Otieno Raminya complies with the provisions of Order 5 Rules 5, 6, 7, 8 and 15 (1) *Civil Procedure Rules*. That the 3rd and 4th Respondents have not disputed service. That it is only the 2nd Respondent who disputes service though he was served through his agent and mother Margaret Osiga, the 3rd Defendant upon authorization. Relying on the case of CA No 6 of 2015 *James Kanyita Nderitu vs Maries Philotas Ghika and Another* [2016] eKLR Counsel submitted that the judgement herein was regular judgement and hence the court should exercise the unfettered discretion judiciously by not setting it aside as the application has been made after inordinate delay. That the application was made four (4) years after the judgement. That the decree was executed long time ago and that circumstances have changed. That the Plaintiff will suffer prejudice.
8. On whether or not the applicants have a good defence, Counsel submitted that the applicants have not annexed a draft defence to the application so as to give the court an opportunity to look at the defence and to judiciously make a decision as to whether there is a defence that raises triable issues. Counsel relied on the case of *Moses Kimaiyo Kipsang vs Geoffrey Kiprotich kirui and 2 others* [2020] eKLR for this submission. Counsel prayed that the application be dismissed.
9. Order 10 Rule 11 gives discretionary powers to the court to set aside or vary ex parte judgement entered in default of appearance or defence and any consequential decree or order upon such terms as are just. Case law has set the grounds upon which such judgement may be set aside as; the reason for failure by the Defendant to file Memorandum of Appearance and Defence within the time stipulated by law, the length of time that has passed since the default judgement was entered, whether the intended defence raises triable issues, the respective prejudice that each party is likely to suffer and whether on the whole, it is in the interest of justice to set aside the default judgement. (See case of CA No 6 of 2015 *James Kanyita Nderitu vs Maries Philotas Ghika and Another* [2016] eKLR relied on by the Respondent).
10. The reason given herein for failure to Enter Appearance and file defence herein was that the applicants were not aware of the existence of the case as they were never served with summons to enter appearance. In paragraph 8 of the Supporting Affidavit, the deponent, the 2nd Defendant averred that they were not served with the Summons to Enter Appearance.
11. I have carefully read and considered the contents of the Affidavit of Service of Julius Otieno Raminya the process server who claims to have served the Summons to Enter Appearance upon the applicants. The Affidavit of service was sworn by the process Server on October 23, 2018 and filed in court on October 24, 2018. The process Server describes how he accessed the applicants and served them with the Originating Summons. He states that he was accompanied by the Respondent during the exercise, who identified the applicants to him and witnessed the service. Although the applicants called the process server for cross-examination on the service under Order 5 rule 16 *Civil Procedure Rules*, they did not call the said Plaintiff for the same. I have considered the said process server's evidence in court during the cross-examination. I find the evidence of the process server to be consistent and credible. I am persuaded that the applicants were served with Summons to Enter appearance personally safe for the 2nd Applicant on whose behalf the Summons were received by the 3rd Defendant. It is not always that a pillion passenger will get to know the full name of the motor cycle rider or memorize the registration number of the motor cycle. Hence the failure by the process server on cross-examination to remember these details does not in my view mean that the process server did not travel to the applicant's home to serve the Summons. Although it may be important to state how the serving officer accessed the defendants for service, there is no requirement of law that the process server indicates the means of transport used to travel to reach the Defendants for service. What order 5 rule 15 requires of a



process server or serving officer is to 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 (if any) of the person identifying the person served and witnessing the delivery or tender of summons. I find that the process server complied with the requirements.

12. The next consideration is whether the Defendants have a good defence which raises triable issues. The applicants have explained the nature of their defence. The applicants state that they are the Administrators of the estate of James Odhiambo Otieng one of the registered owners of the suit land. They annexed to the application a copy of Grant of Letters of Administration Intestate to the estate of the deceased. They also annexed a copy of certificate of grant transmitting the suit land to the 2nd Defendant in trust for the other beneficiaries of the deceased. The 2nd applicant averred in paragraph 24 of the Supporting Affidavit that his family has been in occupation of the suit land since it was acquired in 1980 and has been using it for farming to date. The purpose of the setting aside the ex parte judgement is to give the applicants a chance to be heard. They must therefore demonstrate as a ground for the application that they have a good defence. Though there is no draft defence attached to the application, I am satisfied from the contents of the Supporting Affidavit that the applicants have a good defence.
13. It is not disputed that it is only the 1st Defendant who entered into the consent judgement with the Plaintiff to the effect that judgement be entered in favour of the Plaintiff as against her. The court record show that because the applicants had not entered appearance and filed defence the court entered judgement against them as well. There is no provision for entry of ex parte judgement in a claim for land. Under the provisions of Order 10 *Civil Procedure Rules*, the claim against the applicants being unliquidated should have proceeded to ex parte hearing (formal proof). There is no evidence that the matter has ever proceeded to *ex parte* hearing.
14. Although the Respondent contended that the judgement has long been executed, no evidence was exhibited to demonstrate this. Execution of the judgement would involve transfer of the suit land in favour of the Respondent. There is no evidence to show that the judgement has been executed.
15. Judgement against the 1st Respondent was entered by consent. The 1st Defendant was said to have since passed on (See paragraph 22 of the Supporting Affidavit). The applicants have only challenged the judgement against them. As per the copy of register exhibited by both parties, the deceased only owned one half of the suit land.
16. For the foregoing reasons and taking into account all the circumstances of this case, I find that the application has merit and allow it as follows: -
 - i. The judgement entered herein against the 2nd, 3rd and 4th Defendants (the applicants) on September 2, 2020 is set aside.
 - ii. The 2nd, 3rd and 4th Defendants do file and serve Reply to the Originating Summons within 14 days of this ruling
 - iii. Thrown away costs of Kshs 10,000/= to the Plaintiff to be paid within 30 days hereof.
17. It is so ordered.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 6TH DAY OF JULY 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

**E. ASATI,
JUDGE.**



In the presence of:

Kevin - Court Assistant.

No appearance for the 2nd, 3rd and 4th Defendants/Applicants.

Ogonda for the Plaintiff/Respondent

