



Okong'o v Omamo & 4 others; Ogwang & another (Interested Parties) (Environment & Land Case 26 of 2015) [2023] KEELC 20640 (KLR) (12 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20640 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 26 OF 2015
SO OKONG'O, J
OCTOBER 12, 2023**

BETWEEN

MAURICE OGWANG OKONG'O PLAINTIFF

AND

FREDRICK OMONDI OMAMO 1ST DEFENDANT

EVERLYNE ATIENO OKECH 2ND DEFENDANT

WYCLIFFE ABOK 3RD DEFENDANT

LAND REGISTRAR-KISUMU 4TH DEFENDANT

THE ATTORNEY GENERAL 5TH DEFENDANT

AND

NOAH OCHIENG OGWANG INTERESTED PARTY

GERALD CORNELL OCHIENG AJUMBO INTERESTED PARTY

RULING

Background

1. The Plaintiff brought this suit against the 1st to 3rd Defendants by way of Originating Summons dated 29th January 2015. For some unknown reason, the Plaintiff also filed a plaint in the same suit against the 1st to 3rd Defendants on 3rd February 2015. The firm of D.O.E.Anyul & Company Advocates entered appearance for the 1st, 2nd and 3rd Defendants on 14th February 2015. It is not clear whether the appearance was to the suit by Originating Summons or a plaint. The Plaintiff filed amended Originating Summons and amended plaint on 22nd October 2015 in which he added the 4th and 5th Defendants as parties to the suit by Originating Summons and that by a plaint. In the plaint, the Plaintiff averred that at all material times, the Plaintiff was the absolute registered and/or equitable



owner of all that parcel of land known as Title No. Kisumu/Kanyawegi/ 5783 (hereinafter referred to as “the suit property”). The Plaintiff averred that on or about 14th January 2013 and on or about 15th October 2012, the 1st, 2nd and 3rd Defendants in conspiracy with the 4th and 5th Defendants fraudulently and unlawfully transferred the suit property into their names without the consent of the Plaintiff. The Plaintiff sought an order of injunction restraining the Defendants from interfering with the suit property and an order for the rectification of its register with a view to restoring the title of the property into the name of the Plaintiff. In the Originating Summons, the Plaintiff sought the determination of several issues.

2. The Attorney General entered appearance for the 4th and 5th Defendants in the Originating Summons and the plaint on 4th November 2015. The firm of D.O.E.Anyul & Company Advocates for the 1st, 2nd and 3rd Defendants filed “Reply To Amended Plaint” on 18th January 2016. I have not seen on record a defence by the 1st, 2nd and 3rd Defendants to the original plaint. In the reply to the amended plaint, the 1st, 2nd and 3rd Defendants averred that it was the Plaintiff who unlawfully and illegally transferred the suit property to his name before selling the same to the 3rd Defendant. The 1st, 2nd and 3rd Defendants averred that the 3rd Defendant came to learn of the Plaintiff’s said illegal and unlawful actions after the 3rd Defendant had sold the suit property to the 1st and 2nd Defendants. The 4th and 5th Defendants did not respond to the amended Originating Summons and the amended plaint. The 1st, 2nd and 3rd Defendants did not also respond to the Originating Summons and amended Originating Summons. From the proceedings, the court seems to have heard the claim by Originating Summons and that by a plaint together. At the trial, the Plaintiff and the 3rd Defendant gave evidence. In a judgment delivered on 30th May 2018, the court found that the Plaintiff, the 3rd Defendant, and the 1st and 2nd Defendants did not acquire the suit property lawfully. The court ordered the rectification of the register for Title No. Kisumu/Kanyawegi/ 5783 (the suit property) by cancelling the registration of the property in the names of the Plaintiff, the 3rd Defendant, and the 1st and 2nd Defendants. The court ordered further that the property be restored into the names of the first registered owners who were all deceased and that succession proceedings be undertaken in respect of their estates by those interested in the property. The court order was extracted and registered against the title of the suit property on 12th June 2018 with the effect that the registration of the property in the names of the Plaintiff, the 3rd Defendant, and the 1st and 2nd Defendants were all cancelled together with the title deeds that were issued to them. The beneficiaries of the estate of the deceased first registered owners did succession and a Grant was issued in the name of the 1st Interested Party. The 1st Interested Party was registered as the proprietor of the suit property on 20th July 2020. On 28th December 2020, the property was transferred by the 1st Interested Party to the 2nd Interested Party. A title deed was issued in the name of the 2nd Interested Party on the same date.

The application before the court

3. What is now before me is a Notice of Motion Application dated 16th November 2022 brought by the 1st and 2nd Defendants under the provisions of Order 10 Rule 11, and Order 51 Rule 1, of the Civil Procedure Rules and Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya. In the application, the 1st and 2nd Defendants have sought the following orders;
 1. That leave be granted to the firm of Owiti, Otieno & Ragot Advocates to come on record for the 1st and 2nd Defendants in place of Ms. D.O.E Anyul & Co. Advocates.
 2. That a temporary order of injunction does issue, restraining the Plaintiff, and the 1st and 2nd interested Parties, whether by themselves, their agents, their servants or any one claiming through them, from, transferring, using, developing, and in any way interfering with the suit



parcel of land known as Title No. Kisumu/Kanyawegi/5783 (the suit property), pending hearing of this application inter partes (spent).

3. That this Honourable Court be pleased to set aside the judgment of this Honourable Court, delivered on 30th May 2018 and the entire consequential proceedings in this suit, in addition, this Honourable Court be pleased to order that the Interested Parties herein, Noah Ochieng Ogwang & Gerald Ochieng Ajumbo be joined in the suit as the 4th and 5th Defendants respectively, and the applicants be allowed to defend themselves in the suit.
4. That a temporary order of injunction does issue, restraining the Plaintiff and the 1st and 2nd Interested Parties, whether by themselves, their agents, their servants or any one claiming through them, from, transferring, using, developing, and in any way interfering with the suit property pending the full hearing and the determination of the suit.
5. That cost of this application be borne by the Plaintiff.
4. The application that was supported by the affidavit of the 1st Defendant was brought on several grounds. The 1st and 2nd Defendants (hereinafter referred to only as “the Applicants”) averred that the Plaintiff filed this suit against the Defendants seeking amongst others, a prayer for a permanent injunction against the Defendants from interfering with the suit property and for the land registrar to rectify and/or reconstitute the records of the suit property in favour of the Plaintiff. The Plaintiff also sought the costs of the suit.
5. The Applicants averred that by a judgment of this court dated 30th May 2018, the court ordered the Kisumu County Land Registrar to rectify the register of the suit property by deleting all the entries indicating ownership of the suit property by the 1st, 2nd and 3rd Defendants. The court also ordered the said Land Registrar to recall the title deeds issued to the 1st, 2nd and 3rd Defendants for cancellation.
6. The Applicants averred that they live in Switzerland and at the time this suit was filed, they were the registered owners of the suit property. The Applicants averred that they were never served with the Summons to Enter Appearance and the pleadings to enable them defend their rights to the suit property.
7. The Applicants averred that they only learnt of the existence of this suit after a routine visit to the Land Registry to check on the status of the suit property with a view to developing the same. The Applicants averred that they were shocked to learn that the suit property was registered in the name of the 2nd Interested Party. The Applicants averred that on further investigations, they realised that their title to the suit property was cancelled through a court order made in the said judgment dated 30th May 2018.
8. The Applicants averred that from a perusal of the court records, the Applicants were shocked to realise that there was a Memorandum of Appearance filed on 17th February 2015 by the firm of Ms. D.O.E Anyul & Co. Advocates who purported to represent the 1st, 2nd and 3rd Defendants in the suit, yet the 1st and 2nd Defendants/Applicants never instructed the said firm of advocates to appear on their behalf in the matter. The Applicants averred that they had never been in any form of communication with the said firm of advocates and they never instructed it to represent them in this suit.
9. The Applicants averred that they had appointed the firm of Ms. Owiti, Otieno & Ragot advocates to represent them in this matter in place of the said firm of Ms. D.O.E Anyul & Co. Advocates. The Applicants averred that they were the rightful owners of the suit property having purchased the same from the 3rd Defendant sometime in 2012 at a consideration of Kshs.3, 375,000/-. The Applicants averred that they took immediate possession of the land and fenced the same.



8. The Applicants averred that the 3rd Defendant despite being sued together with the Applicants, never informed the Applicants of the suit against them and which was likely to adversely affect the Applicants' interest in the suit property. The Applicants averred that they were bona fide purchasers of the suit property for value and as such were not trespassers on the property. The Applicants averred that it was in the interest of justice that the firm of Ms. Owiti, Otieno & Ragot advocates be allowed to come on record to represent the Applicant's best interest. The Applicants averred that they were not conversant with the firm purporting to represent them in these proceedings known as Ms. D.O.E Anyul & Co. Advocates and that they never instructed the said firm to represent them.
9. The Applicants contended that it was uncanny that they were represented in court and yet a perusal of the court file reveals that they never filed and/or signed any witness statement and documents in support of their case and neither did they ever attend court to testify and/or follow up on the court proceedings.
10. The Applicants averred that the judgment and the subsequent proceedings sought to be set aside were highly prejudicial to them because they had lost the suit property which they bought lawfully without being given an opportunity to defend their interest in the property. The Applicants averred that they were desirous of having the judgment of this court delivered on 30th May 2018 set aside and the case re-opened. The Applicants averred that they were also seeking to be allowed to defend themselves and file a notice of claim against the 3rd Defendant. The Applicants averred that they had an unassailable defence to the Plaintiff's case which raised triable issues.
11. The application was opposed by the 2nd Interested Party through a replying Affidavit sworn on 3rd May 2023. The 2nd Interested Party averred that the application was incompetent, frivolous and misconceived hence did not meet the criteria for the grant of the orders sought. The 2nd Interested Party averred that on or about 2020, he purchased the suit property from the 1st Interested Party after doing due diligence and confirming that the 1st Interested Party was indeed the rightful owner of the said parcel of land having acquired it from his father Maurice Ogwang Okong'o through Kisumu CMC Succession Cause number 535 of 2017.
12. The 2nd Interested Party averred that he was not a party to the alleged proceedings that led to the cancellation of the Applicants' title. The 2nd Interested Party averred that he was advised by his advocates on record who perused the court file that the Applicants purchased the suit property from the 3rd Defendant who acquired the same fraudulently from the Plaintiff. The 2nd Interested Party averred that it was very clear that there was no way the 3rd Defendant could have transferred a clean title to the Applicants yet he did not have a clean title.
13. The 2nd Interested Party averred that the Applicants were represented in these proceedings by the firm of Ms. D.O.E Anyul & Co. Advocates. The 2nd Interested Party averred that the Applicants cannot be allowed to turn around and claim that they were not represented. The 2nd Interested Party averred that the Application had not met the threshold for granting the orders sought. The 2nd Interested Party averred that the Applicants had no reasonable defence to put forward to the Plaintiff's claim.
13. The application was argued by way of written submissions. The Applicants filed their submissions on 5th June 2023 while the 2nd Interested Party filed his submissions on 9th June 2023.

The Applicants' submissions

14. The Applicants submitted that where there is an irregular judgment like in the present case, judgment would be set aside as of right and the court will not venture to consider whether or not there exists a defence on merit. The Applicants averred that in any event they had annexed to their affidavit in



support of the application a defence that raised triable issues. The Applicants submitted that unless the application was allowed, they would lose the suit property without having been given a fair hearing as enshrined in Article 50 of *the Constitution* of Kenya, in which case justice shall not have been done and seen to have been done. The Applicants urged the court to allow the application. The Applicants cited several authorities in support of the submissions which I have considered.

The 2nd Interested Party's submissions

15. The 2nd Interested Party submitted that the judgment entered herein on 30th May 2018 should not be set aside on the ground that the Applicants were not served with summons and as such never participated in the hearing of the suit. The Applicants submitted that it was clear from the record that the Applicants were represented by the firm of Ms. D.O.E Anyul & Co. Advocates who entered appearance for the Applicants. The 2nd Interested Party submitted that there was no need to file an affidavit of service in the circumstances since the Applicants entered appearance through the said firm and filed a defence.
16. On the issue of whether the Applicants had a defence on merit, the 2nd Interested Party submitted that the court while cancelling the Applicants' title found that the 3rd Defendant had obtained the said title by fraud and thereafter transferred the same to the Applicants. The 2nd Interested Party submitted that since the 3rd Defendant had no valid title to the property, there was no way he could have transferred a valid title to the Applicants. The 2nd Interested Party submitted that the setting aside of the judgment entered herein would be a waste of the court's time since the Applicants had no valid title. The 2nd Interested Party submitted that the Applicants had no defence on merit to the Plaintiff's claim and that the only option open to them was to pursue their claim against the 3rd Defendant through a separate suit.
17. The 2nd Interested Party submitted that the Applicants' application was an afterthought brought after inordinate delay. The 2nd Interested Party submitted that the application was unmerited, unjustified, and appeared to be an attempt to prolong the life of this case to the prejudice of the 2nd Interested Party.

Analysis and determination

18. I have considered the Applicants' application together with the affidavit filed in support thereof. I have also considered the affidavit filed in opposition to the application and the submissions by the advocates for the parties. The following is my view on the matter:
19. The Applicants' application was brought under Order 10 Rule 11 of the *Civil Procedure Rules* which provides for the setting aside of judgment entered as a consequence of non-appearance or failure to file a defence. The Rule provides as follows:

“Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”
20. In *James Kanyita Nderitu & Another v. Marios Phillotas Gbikas & another* [2016]eKLR cited by the Applicants, the court summarised the principles upon which the court exercises its discretionary jurisdiction to set aside a default judgment as follows:

“In regular default judgment, the defendant will have been duly served with summons to enter appearance or to file a defence, resulting in default judgment. Such a defendant is entitled under Order 10 Rules 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 rises 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.”

21. In *Shah v. Mbogo* [1967] EA 166 the court stated as follows on the guiding principles in applications to set aside ex-parte judgment:

“Firstly, there are no limits or restrictions on the judge’s discretion to set aside except that if the judge does vary the judgment he does so on such terms as may be just. The main concern of the court is to do justice to the parties, and the court will not impose conditions in itself to fetter the wide discretion given to it by the rules. Secondly, the discretion to set aside is intended to be so exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

22. In *Patel v. East African Cargo Handling Services Ltd* [1974] EA75 the court, Duffus, V.P stated as follows:

“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 to it by the rules. I agree that where 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 merits. 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”

23. I am of the view that the Applicants’ application succeeds or fails on only one issue namely, whether or not the Applicants had instructed the firm of Ms. D.E.O Anyul & Company advocates to act for them in this matter. It is not disputed that the firm of Ms.D.E.O Anyul & Company advocates entered an appearance in this matter on behalf of the 1st, 2nd and 3rd Defendants on 17th February 2015, filed pleadings and conducted the hearing on their behalf. The Applicants have contended that the said firm of advocates had no instructions to act for them. Advocates are officers of the court and when they appear in a matter before the court, the court will assume that they have instructions until the contrary is proved. It is not a light matter to claim that an advocate acted without instructions. Acting without or contrary to instructions is professional misconduct. The burden was on the Applicants to demonstrate in my view to a higher degree that the firm of Ms. D.E.O Anyul & Company advocates acted for them without instructions. A part from one letter dated 13th October 2022 addressed to the firm of Ms. D.E.O Anyul & Company advocates by their advocates on record asking how the firm was instructed, there is nothing else to show that the Applicants were aggrieved with the said advocates’ alleged conduct. I am of the view that this is not something that should be taken lightly. Every loser of a court case will come back to set aside the judgment on the ground that he had not given instructions to the advocate who represented him in the lost case if such allegations are not accorded the seriousness they deserve. I am not persuaded by the material before me that the Applicants have established that the firm of Ms. D.E.O Anyul & Company advocates acted without instructions. In the circumstances, the judgment that was entered against the Applicants herein on 30th May 2018 was a regular judgment.



I also tend to agree with the 2nd Interested Party that the Applicants' application was an afterthought. I have noted from the material on record that the Applicants knew by 10th January 2022 that the suit property had been transferred to the 2nd Interested Party. That is according to the Certificate of Official Search annexed to the affidavit in support of the application. I have also noted that as of 14th January 2022, the Applicants had even obtained a copy of the extract of the register for the suit property which showed that their title was cancelled pursuant to a court order. No explanation has been given as to why it took the Applicants 10 months to bring the present application after getting information that their title had been cancelled and the property transferred to the 2nd Interested Party.

24. I am also not persuaded that setting aside the judgment entered herein on 30th May 2018 will serve any purpose. The evidence before the court shows that the suit property was registered in the name of 4 deceased persons as at the time the same was transferred to the Plaintiff on 12th October 2012. As at that date, letters of administration had not been taken out in respect of the estates of the deceased persons. The suit property was therefore transferred to the Plaintiff illegally. The Plaintiff did not have a valid title to the suit property that he could transfer to the 3rd Defendant from whom the Applicants acquired their title. The 3rd Defendant having acquired an invalid title from the Plaintiff, similarly had no valid title that he could transfer to the Applicants. The titles that were held by the Plaintiff, the 3rd Defendant, and the Applicants were all tainted with illegalities and as such were null and void. These are facts that would not change even if the Applicants were given an opportunity to defend the suit. Their title would ultimately be cancelled. I am in agreement with the 2nd Interested Party that the best option available to the Applicants is to pursue a refund of the purchase price from the 3rd Defendant, the court having held that the 3rd Defendant had no valid title that he could transfer to the Applicants. I have noted that the Applicants intend to bring a claim against the 3rd Defendant for the recovery of the purchase price paid to him of Kshs. 3,500,000/- plus interest through a Notice of Claim against a co-defendant. I believe that cause of action can be pursued in a separate suit. Due to the foregoing, I am not persuaded that good grounds have been put forward to warrant the setting aside of a regular judgment entered herein.

Conclusion

25. The upshot is that the Applicants' application dated 16th November 2022 has no merit. The application is dismissed with costs to the 2nd Interested Party.

DELIVERED AND DATED AT KISUMU ON THIS 12TH DAY OF OCTOBER 2023

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Anuro h/b for Ms. Oduor for the 1st and 2nd Defendants

N/A for the 3rd Defendant

N/A for the 4th and 5th Defendants

Ms. Otieno for the 2nd Interested Party

