



Oriango v The County Government of Nyamira & 4 others (Environment & Land Case 95 of 2021) [2023] KEELC 22606 (KLR) (8 November 2023) (Ruling)

Neutral citation: [2023] KEELC 22606 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 95 OF 2021**

JM KAMAU, J

NOVEMBER 8, 2023

BETWEEN

JAMES ONYANGO ORIANGO PLAINTIFF

AND

THE COUNTY GOVERNMENT OF NYAMIRA 1ST DEFENDANT

ZACHARIAH ODIDA KISIMA 2ND DEFENDANT

PATRICK MONARI 3RD DEFENDANT

HEDSON NYALI 4TH DEFENDANT

THE HON. ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. Before me is an application by the 2nd and 3rd Defendants dated 19/6/2023 seeking to set aside the Judgment of this court dated and delivered on 22/3/2023 where the applicants depone that summons to enter appearance were never served upon them. They also pray for an order of stay of execution and costs of the application. In the joint supporting affidavit, sworn on 19/6/2023 by the applicants, the 2 depone that they were never served with summons to enter appearance but that they were only served with a mention notice dated 22/5/2023 after the Judgment was delivered. They aver that if the said Judgment is not set aside then they would be condemned unheard. They also say that they are committed to abide and comply with any conditions given by the court and that the plaintiff/Decree Holder would suffer no prejudice as a result of the setting aside of the judgment. They also attached to their Application a draft statement of defence denying the Plaintiff's claim.
2. On his part, the plaintiff/decree holder opposed the Application *vide* replying affidavit sworn on 29/9/2023 where he depones that the Applicants were all along aware of the Suit since they were served



on 17/7/1999 and the Affidavits of service are attached, a hearing notice on 22/4/2022 and that on 27/7/2023 they were represented in court by the honourable attorney general.

3. When the Application came up for hearing in court both Applicants admitted that they indeed attended this matter in Kisii more than 20 times each and that they used to get summons through their area District Officer and that in the documents served upon them, their names appeared.
4. The implication of this is that both applicants were from the outset aware that they had been sued in their personal capacities and ought to have sought legal counsel on what to do. They have attended court all through but have now chosen to strategically feign ignorance. When the application for stay of execution dated 2/6/2023 was filed in court, the 2 decided that now it was an opportune moment as well to seek a stay of execution as well as the setting aside of the Judgment. This time they were not represented by the Attorney General whom they claimed was representing them earlier on. Perhaps because the reality of the consequence of what they had done and what was in court all along was about to be felt.
5. Hearing of the instant suit proceeded *ex parte* in the absence of the 2nd and 3rd Defendants who failed to enter appearance in spite of being served. Judgment in the matter was delivered on 22nd March 2023 in favour of the Plaintiff. A Decree was issued and Execution proceedings were taken out by the Plaintiff. The Defendants were served with a Notice of Execution of the Decree and that provoked the Defendants to file the instant Application, the subject of this Ruling.
6. The defendants' notice of motion dated expressed to be brought under order 10 rule 11, order 6 rule 1, order 22 rule 25, order 51 rules 1 & 13 and order 50 rule 6 of the Civil Procedure Rules and sections 1A, 1B, 3A, 63 (E) and 95 of the Civil Procedure Act and article 159 (2) (d) of the Constitution of Kenya, 2010 prays for an order of stay of execution of the decree; an order setting aside Judgment entered against the defendants on March 22, 2023 and all consequential orders therefrom; and that the applicants be granted leave to file a defence out of time. The application is supported on the grounds set out on the body of the Application and the affidavit sworn by the applicants in support thereof sworn on 19/6/2023.
7. Principally, the applicants aver that they were never served with Summons to enter appearance or any pleadings save the Mention Notice after Judgment.
8. In an application to set aside an *ex parte* Judgment such as is before me, the issue for consideration and determination is whether on the facts and circumstances the court ought to exercise its discretion in favour of the defendant/applicant and set aside the Judgment. The court has to consider the reasons that may have occasioned default in entering appearance and such reasons and/or explanations as the Applicant may adduce. The Court of Appeal in the case of Janes Kanyiita Nderitu & another v Marius Phillotas Chikas & another (2016) summarized the criteria upon which the courts exercise discretionary jurisdiction 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 rule 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 raises 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.”

9. In the case of *Shah v Mbogo* (1967) EA 166 the court of appeal established the guiding principles that a court needs to consider in an application to set aside an *ex parte* judgment. The court stated thus: -

“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.”

10. In the instant matter, the defendants/applicants aver that they were not served with Summons to enter appearance. However, the records plus their own admissions speak otherwise.
11. The Applicants argued that they failed to file defence because they were not served with the requisite documents by the Plaintiff. The Plaintiff denied the allegation. He stated that the Defendants were properly served with court documents and that they received them. He demonstrated this by annexing to his Affidavit the copies of Affidavit of service indicating that each of the Defendants were served. I have carefully studied the Court record, the Affidavits of service sworn and I find that it explains well and clearly how the defendants were identified to the Process Server when he effected service and how the service was done. Having come to the conclusion that service was proper and the Applicants did not attend Court at their fault when the matter proceeded I find that the Judgment delivered on 22/03/2023 was regular. From the facts of the instant case, I have taken into account the reasons given by the Defendants for failure to file their appearance and Defence and I do not find them truthful and convincing. For the reasons given above the Application dated 19/6/2023 is hereby dismissed with costs to the Plaintiff.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 8TH DAY OF NOVEMBER 2023.

MUGO KAMAU

JUDGE

In the Presence of:-

Plaintiff in person

Mr. Ondima for 2nd and 3rd Defendant

