



Omulo v Mbaja & 2 others (Sued as the administrators of the Estate of Elijah Mbaja) (Environment and Land Case Civil Suit 19 of 2020) [2023] KEELC 21207 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21207 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 19 OF 2020
SO OKONG'O, J
NOVEMBER 2, 2023**

BETWEEN

PETRO ODONGO OMULO APPLICANT

AND

OKINYA MBAJA 1ST RESPONDENT

ONYANGO MBAJA 2ND RESPONDENT

OUMA MBAJA 3RD RESPONDENT

SUED AS THE ADMINISTRATORS OF THE ESTATE OF ELIJAH MBAJA

RULING

1. The Applicant brought this suit by way of Originating Summons dated 12th February 2020 on 20th February 2020 against the Respondents, Okinya Mbaja, Onyango Mbaja, Ouma Mbaja as the administrators of the estate of Elijah Mbaja, deceased seeking orders that; the Applicant be declared to have acquired prescriptive rights over the entire parcel of land known as Title No. Kisumu/Kadongo/3105 (hereinafter referred to as “the suit property”) by way of adverse possession and that the Respondents do sign an application for consent and transfer form in respect of the property in favour of the applicant failing which the registrar of the High Court be mandated to sign the same. The Applicant also sought the costs of the suit.
2. The Respondents were said to have been served with the Originating Summons on 26th January 2021 but failed to enter appearance. The suit was heard on 26th October 2021 in the absence of the Respondents who were said to have been served with a hearing notice on 23rd September 2021 but failed to attend court. In a judgment delivered on 26th October 2021, the court found that the Applicant had proved his adverse possession claim against the Respondents and allowed the Originating Summons as prayed.



3. On 23rd March 2023, the Applicant filed an application for execution. In the application, the Applicant sought an order that a Notice to Show Cause be issued for service upon one, John Okinya Mbaja to appear in court and show cause why he should not be evicted from the suit property. The court issued a Notice to Show Cause on 29th March 2023 against all the Respondents and fixed the same for hearing before the Deputy Registrar on 31st May 2023. The Respondents were served with the Notice to Show Cause on 29th March 2023. The Respondents responded to the said Notice to Show Cause through a Replying Affidavit sworn by John Okinya Mbaja on 29th May 2023 in which he stated that the Respondents were never served with the Originating Summons or any other pleadings in this suit. He averred that they only came to know of the suit upon being served with the Notice to Show Cause.
4. What is now before the court for determination is the Respondents' Notice of Motion Application dated 29th May 2023 brought under Order 22 Rule 6, Order 10 Rule 11, Order 12 Rule 7, Order 9 Rules 9 and 10 of the Civil Procedure Rules 2010, and Sections 1A, 1B,3,3A and 63 (e) of the Civil Procedure Act 2010. In the application, the Respondents have sought an order for the setting aside of the judgment entered on 20th July 2022(sic) together with all the consequential orders arising therefrom. The Respondents have also sought the costs of the application.
5. The Application was based on several grounds. The Respondents contended that the Originating Summons dated 12th February 2020 was incompetent and defective in that at the time, the Respondents were sued as the administrators of the estate of Elijah Mbaja, the Respondents had not been issued with a Grant of Letters of Administration in respect of that estate. The Respondents averred that the Grant of Letters of Administration in respect of the estate of Elijah Mbaja, deceased was issued to John Okinya Mbaja on 15th December 2020 and that the same was confirmed on 19th August 2021. The Respondents averred that as at 20th February 2020 when this suit was filed against them, they had no legal capacity to defend the said estate.
6. The Respondents averred further that they were never served with Summons to Enter Appearance or any pleading in the suit as required by law. The Respondents averred that they only became aware of the suit upon being served with the Notice to Show Cause.
7. The Respondents averred further that they were never served with a notice of entry of judgment against them as required by the law. The Respondents averred further that as at the time the impugned judgment was entered on 26th October 2021, the suit property was no longer in the name of Elijah Mbaja, deceased. The Respondents averred that the property was transferred to the name of John Okinya Mbaja on 19th May 2022. The Respondents averred that they had a good defence to the Applicant's suit and as such it would serve the interests of justice if the *ex parte* judgment was set aside.
8. The Applicant opposed the application through grounds of opposition dated 3rd July 2023 and a replying affidavit sworn by the Applicant on 14th August 2023. In his grounds of opposition, the Applicant averred that the Respondents were served more than 3 times before the hearing of the suit commenced and twice after the judgment was delivered. The Applicant contended that the Respondents' application was an abuse of the court process and should be dismissed. The Applicant contended that the Respondents were properly sued.
9. The Applicant averred that the Respondents were guilty of laches and as such they were not deserving of an equitable relief. The Applicant contended that the judgment of the court had already been executed and as such the Respondents' golden defence had come late in the day. In his replying affidavit, the Applicant annexed affidavits of service to show that the Respondents were not only served with the Originating Summons but also with a hearing notice. The Applicant averred that the Respondents had lodged a criminal complaint against him at Maseno Police Station in 2018 as legal representatives



of Elijah Mbaja following which complaint, he was charged with a criminal offence. The Applicant contended that the Respondents were estopped from claiming that they were not administrators of the estate of the said Elijah Mbaja deceased when they were sued. The Applicant averred that in any event, the 1st Respondent, John Okinya Mbaja had been appointed as an administrator of the estate of the said deceased. The Applicant averred that the suit property had already been registered in his name and as such the application by the Respondents had been overtaken by events.

10. The application was heard on 27th September 2023. The Respondents' advocate submitted that the Respondents were never served with Summons to Enter Appearance and that the Originating Summons was incompetent because it was instituted against persons who were not the administrators of the estate of Elijah Mbaja, deceased. On his part, the Applicant's advocate submitted that all the Respondents were served in their houses and the affidavit of service was on record. On the issue of competency of the suit, the Applicant's advocate submitted that the same should have been raised in a defence. The Applicant's advocate submitted that a party who ignored the court process cannot come after the conclusion of a case to claim that he had a good defence. The Applicant submitted that the application failed on the doctrine of muteness. The Applicant submitted that the Respondents had postured as the administrators of the estate of Elijah Mbaja, deceased at Maseno Law Courts where they caused the Applicant to be charged. The Applicant submitted that the Respondents were estopped from denying that they were the administrators of the estate of the deceased at the time this suit was filed. The Applicant submitted that even if it was true that the Respondents were not the administrators of the estate of the deceased, the Respondents had no defence to the Applicant's adverse possession claim. The Applicant submitted that if the court were to find that the suit was defective, the much the court could do was to strike out the suit.

Analysis and Determination

11. I have considered the Respondents' application together with the affidavit filed in support thereof. I have also considered the grounds of opposition and replying affidavit filed by the Applicant in opposition to the application. Finally, I have considered the submissions by the advocates for the parties. Although the Respondents have cited several provisions of the *Civil Procedure Act* and Rules, I am of the view that the relevant provision of the *Civil Procedure Rules* is Order 10 Rule 11 of the *Civil Procedure Rules*. This Rule gives the court power to set aside a judgment entered in default of appearance or defence. Order 10 Rule 11 of the *Civil Procedure Rules* 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.”

12. The powers conferred on the court under Order 10 Rule 11 of the Civil Procedure are discretionary. In *Patriotic Guards Ltd v. James Kipchirchir Sambu* [2018]eKLR the court stated as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”



13. In *Patel v. E.A Cargo Handling Services Ltd.* [1974] EA 75 the court stated that:

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgement 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 on itself to fetter the wide discretion given to it by the rules.”

In *Shah v. Mbogo* [1967] EA 116 the court stated that:

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

14. In *James Kanyitta Nderitu & Another* [2016] eKLR, the Court of Appeal stated as follows:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file 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 judgement 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 default judgment, and will take into account such factors as the reason for 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 and whether on the whole it is in the interest of justice to set aside the default judgment, among others.

In *Miruka v. Abok & Another* [1990] KLR 541, it was held that:-

“Where service is disputed there is a qualified presumption in favour of the process server. The burden lies on the party questioning the service, to show that the return is incorrect... An affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings.”

15. It is on the foregoing principles that the Respondents’ application is to be determined. The Respondents have not convinced me that they were not served with the Originating Summons. The Process Server who served the Respondents with the Originating Summons and the Hearing Notice was the same process server who served them with the Notice to Show Cause. In his affidavit of service of the Originating Summons, the said Process Server, Linus Odero gave a detailed account of how he effected service. The Respondents have challenged none of those accounts. I find the Respondent’s claim that they were not served with the Originating Summons a mere allegation without any substance. Since the Originating Summons was served upon the Respondents, the judgment sought to be set aside was technically a regular judgment. As mentioned in the cases that I have cited above, the court has the discretion to set aside even a regular judgment for good cause or for the ends of justice to be met. I am of the view that the Respondents have a very strong defence to the Applicant’s suit. I am satisfied from the evidence before me that when this suit was filed, the Respondents were not the administrators of the estate of Elijah Mbaja, deceased. The Respondents had no capacity to be sued. The Applicant’s suit that was against the estate of Elijah Mbaja, deceased could not be maintained



against the Respondents. I have noted that even when the Grant of Letters of Administration was ultimately issued on 15th December 2020 while this suit was pending, it was issued to John Okinya Mbaja only. This means the other Respondents, Onyango Mbaja and Ouma Mbaja against whom judgment was also entered were not and have never been the administrators of the estate of Elijah Mbaja. I am of the view that since the suit property which has now been transferred to the Applicant pursuant to the judgment of this court belonged to the estate of a deceased person who was not given an opportunity to defend the suit, natural justice would require that the judgment be set aside to give the estate an opportunity to be heard in the matter. I am also of the view that the failure of the Respondents to enter appearance is excusable. The Respondents were sued not in their personal capacities but as administrators of the estate of Elijah Mbaja deceased which they were not. They were therefore not under any obligation to defend the suit although this exposed them to a default judgment being entered against them.

Conclusion

16. For the foregoing reasons, I find merit in the Notice Motion dated 29th May 2023. The judgment entered herein on 26th October 2021 and all consequential orders are set aside. The Respondents are granted leave to respond to the Originating Summons. The transfer of Title No. Kisumu/Kadongo/3105 to the Applicant, Petro Odongo Omulo pursuant to the said judgment is cancelled. The Land Registrar shall register an inhibition inhibiting the registration of any other or further dealings with Title No. Kisumu/Kadongo/3105 pending fresh hearing and determination of this suit or further orders by the court. The costs of the application shall abide by the outcome of the suit.

DELIVERED AND DATED AT KISUMU ON THIS 2ND DAY OF NOVEMBER 2023

S. OKONG'O

JUDGE

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

N/A for the Applicant

Mr. Odhiambo C. for the Respondents

Ms. J. Omondi-Court Assistant

