



**Rop v Soo & another (Environment & Land Case 55 of 2018)
[2023] KEELC 21376 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21376 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 55 OF 2018
MC OUNDO, J
NOVEMBER 9, 2023**

BETWEEN

DAVID KIPLANGAT ROP PLAINTIFF

AND

RAEL CHEPTONUI SOO 1ST DEFENDANT

JOHN KIMUTAI MISIK 2ND DEFENDANT

RULING

1. Pursuant to the delivery of a judgment in the instant matter on the May 26, 2022, the 2nd defendant/applicant herein has now filed the present Application by way of a Notice of Motion dated 11th April, 2023 brought under the provisions of Section 1, 1A, 1B, 3, and 3A of the *Civil Procedure Act*, order 10 rule 11 and order 51 rule 1 of the *Civil Procedure Rules* and all enabling provisions of the law, where he seeks the setting aside of the Judgement and/or any consequential orders arising therefrom, entered in default of his appearance and defence.
2. The 2nd defendant/applicant also seeks that the court enlarges time within which he should file his replying affidavit to the originating summons dated July 6, 2018 and thereafter the matter be set down for hearing on merit.
3. The application is supported by the grounds therein as well as by the sworn affidavit of John Kimutai Misik, the 2nd defendant/applicant herein, of an equal date.
4. The 2nd defendant/applicant deponed that he was caught unawares on March 23, 2023 when the area chief of tulwet location visited the homestead of the late Kimisik Arap Soo and informed the family of the impending survey and sub-division exercise to be carried out on LR No Kericho/Roret/521 (the suit land) pursuant to a judgement and decree of this court.



5. That when he sought to find out what the suit was about, he had established that the matter had been active since the year 2018, he thereafter instructed counsel to ascertain the status of the matter and it was established that a judgement had already been entered and implementation orders issued.
6. That the pleadings in the instant suit were never served upon him, neither was he notified of the entry of any judgement against him hence condemning him unheard which was against fundamental tenant of natural justice. That consequently, the resultant decree and subsequent orders were pre-mature and illegal.
7. He further deponed that the matter was in respect to an alleged agreement entered into between the 1st defendant/respondent and the Plaintiff/respondent but the plaintiff/respondent was now seeking to take ownership of the property through adverse possession. That the suit property is registered in the name of Kimisik Arap Soo (Deceased) and the same was the sole asset of the estate available for distribution to the beneficiaries pursuant to the confirmation of grant issued in Kericho Succession cause No 273 of 1999 in which he was one of the administrators.
8. That he had a good and credible defence as evidenced from his draft replying affidavit marked JKM-4 and that the court made its finding under a wrong assumption anchored on the misleading affidavits of service which were erroneous hence tainting the proceedings from the onset. That it was therefore fair in the circumstances that the matter be determined on merits.
9. The application was opposed by the plaintiff/respondent's replying affidavit sworn on May 22, 2023 in which the plaintiff/respondent had deponed that sometime in the year 2018, he took out originating summons and caused the same to be served upon the defendants herein who failed to enter appearance and/or defence nor attend court for hearings despite having been duly served by two different process servers as evidenced by the affidavits of service marked 'DKR 2 (a)-(e). Therefore, the applicant's contention that the pleadings in the instant suit were never served upon him and that he was condemned unheard was a blatant lie since they had been given an opportunity to be heard, which opportunity they had squandered.
10. He further deponed that after the hearing and the failure on the part of the defendants to enter their defence, judgement was delivered on May 26, 2022 whereby the court found that the Plaintiff/Respondent was entitled to 0.57 ha comprised in LR No Kericho/Roret/521 by virtue of adverse possession. That subsequently, upon his application, the court had directed the deputy registrar to execute the transfer forms. That the defendants were duly served with the notice of entry of judgement, decree, and order of the court hence the 2nd defendant/applicant averment that he was caught unawares was not true. That the proceedings herein having lasted 5 years, a number of court processes and orders were issued including a temporary injunction against the defendants herein.
11. That the instant judgement being regular, the court would not usually set the same aside unless it was satisfied that there was a defence on merit since an ex parte judgment should not be set aside to assist a person who had deliberately sought to obstruct or delay the cause of justice.
12. That the 2nd defendant/applicant's defence contained mere denials aimed at obscuring the issues at hand in the instant matter hence the same did not amount to a good and credible defence. Further that the 2nd defendant/applicant had not come to court with clean hands since contrary to his contention that the plaintiff/respondent entered the suit land in the year 2010, there was documentary evidence that the defendants/applicants were aware of the plaintiff/respondent's claim as early as the year 2000. That the 1st defendant had even secured consent to transfer the suit land to the plaintiff/respondent on June 14, 2000 as evidenced by the annexures marked DKR 8 (a)-(e). That prior to the confirmation of grant, the injunction lodged by the court had been duly registered against the title to the suit land as



evidenced by annexure marked 'DKR 9'. Further that the process to confirm the grant that resulted in the certificate of confirmation dated April 2, 2019 was not done in good faith as at all material times, the Defendants/Applicants were aware of the pendency of the plaintiff/applicant's claim and in particular the instant suit.

13. He thus deponed that the 2nd defendant/applicant had no defence whatsoever to his claim, that the instant application was an afterthought meant to delay the fruit of justice, brought too late after execution had commenced. That even if the judgement herein was to be set aside, the 2nd defendant/applicant would not plead and lead better evidence than his co-administrator, the 1st defendant herein, who filed her replying affidavit on October 1, 2019. He thus urged the court to dismiss the instant application with costs.
14. On July 12, 2023, directions were given that the Application be disposed of by way of written submissions. Accordingly, the 2nd defendant/applicant and the plaintiff/respondent filed their written submissions. The 1st defendant/applicant neither filed a response nor written submissions.

2nd Defendant/Applicant's written submissions.

15. In support of his application, the 2nd defendant/applicant herein vide his written submissions dated July 28, 2023, framed issues for determination as follows:
 - i. Whether the 2nd defendant/applicant was ever served with any pleadings, summons and/or other court processes in this matter.
 - ii. Whether the ex-parte judgement dated 18th day of July (sic) 2022 should be set aside.
16. On the first issue for determination, the 2nd defendant/applicant, maintained that his failure to enter appearance and file a defence was due to the fact that the he was not served with the summons and all other court processes hence he was unaware of the existence of the suit, until March 21, 2023 when the area chief of Tulwet location visited his homestead and informed him of the impending survey and sub-division exercise to be carried on LR No Kericho/Roret/521 pursuant to a judgment of this court.
17. That the five affidavits of service attached by the plaintiff/respondent in his replying affidavit show that the process servers visited different villages not known to the defendants herein. That the consistency of the timing in which the process servers met the 1st defendant and the 2nd defendant respectively each time they served the processes casted doubt as to whether the respective services were effected.
18. He relied on the decided cases in *Sebei District Administration v Gasyali & others* (1968) EA 300, *Samuel Njau & another v Pauline Nyawira Gitonga* [2018] eKLR and *Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR to submit that the plaintiff/respondent's replying affidavit had glaring inconsistencies as to the manner and dates of service while avoiding the central issue altogether as to whether the summons were properly served or even served afresh as the court had directed. That the integrity of the service having been questioned, the court had been accorded an opportunity to interrogate the issue further and determine the dispute on merit. Further, that the 2nd defendant/applicant had presented a draft statement of defence which raised triable issues.
19. On the second issue for determination, the 2nd defendant/applicant relied on the provisions of order 10 rule 11 of the *Civil Procedure Rules*, section 3A of the *Civil Procedure Act* and the decided case of *Richard Ncharpai Leiyangu* (*supra*) to submit that the reasons he had given for failing to enter appearance or attend court on the day that the matter proceeded for hearing was candid and excusable hence this was a proper case for the court to exercise its discretion in his favour.



20. That the plaintiff/respondent would not suffer any prejudice if the *ex-parte* judgment was set aside, since all that he would suffer was a slight delay in the conclusion of the instant case and that any such prejudice that the plaintiff/applicant may suffer could be compensated by an award of costs or other directions that the court may deem fit to issue.
21. He concluded by submitting that the instant case was a proper case for the court to exercise its discretion in favour of the 2nd defendant/applicant and accordingly set aside the *ex parte* judgement and all the consequential orders and thereafter order that the instant suit proceeds for hearing afresh as a defended case.

Plaintiff/Respondent's Written Submissions.

22. The plaintiff/respondent in his written submissions dated August 3, 2023, summarized the brief background of the matter before framing his issues for determination as follows;
 - i. Whether there was proper service of the Originating Summons and other court processes upon the 2nd defendant/applicant.
 - ii. Whether the judgement in favour of the plaintiff/applicant was obtained irregularly.
 - iii. Whether the 2nd defendant/applicant's application has merit.
23. On the first issue for determination, the plaintiff/respondent submitted that he adhered to the provisions of order 5 rule 8 of the *Civil Procedure Rules* by instructing a duly licensed process server to serve the court processes upon the 2nd defendant/applicant. That as evidenced by the affidavit of service dated July 12, 2018, the process server, one Vincent O. Ogutu, served upon the defendants copies of originating summons and application dated July 6, 2018 and after the said service was effected upon them, they accepted receipt but declined to sign on the copy. That according to the provisions of Order 5, Rule 13 of the *Civil Procedure Rules*, the defendant's refusal to sign on the copy did not make the said service improper.
24. That both the defendants herein had been served severally with court pleadings as evidenced by the affidavits of services annexed to the replying affidavit, thus the 2nd defendant/applicant's claim of not having been served with all pleadings in the instant matter was misleading and a waste of court's precious time.
25. On the second issue for determination, the plaintiff/respondent relied on the decision in *William Macharia Maina & another v Francis Barchuro & 3 others Kibiwott Yator Kuryases & 8 others (Interested Parties)* eKLR (sic) where the court quoted the decision in *James Kanyita Nderitu & another v Marios Philotas Ghika & another*, Civil Appeal No 6 of 2015 eKLR (Msa) (sic) to submit that the judgment against the defendants was regular as the 2nd defendant/applicant had neither sufficiently demonstrated that he had a good defence that raised triable issues, nor had he demonstrated the prejudice that he would suffer if the orders sought were not granted. That the draft replying affidavit annexed to the 2nd defendant/applicant's application only contained mere denials and averments.
26. He further submitted that the 2nd defendant/applicant had conveniently chosen to deny ever being served by the plaintiff/respondent in spite of the overwhelming evidence to that effect and that it was not the plaintiff/applicant's duty to ensure that the defendant/applicant took part in the proceedings, but rather to ensure that service of the originating summons and subsequent court processes was properly done and dispensed with, which he did.



27. He reiterated that the defendants were duly served with the originating summons whereby they acknowledged receipt but refused to sign on the copy retained by the process server. That pursuant to the said service, the 1st defendant had entered appearance and later filed a replying affidavit on October 1, 2019, thus the assertion by the 2nd defendant/applicant that he was neither served nor was he aware of the instant suit was a lie.
28. Reliance was placed on the decided case of CAO v JO [2018] eKLR to submit that the 2nd defendant/applicant had not demonstrated that he had a good defence that raised triable issues which would warrant the setting aside of judgment, that even if the said judgment was to be set aside, the applicant would lead no better evidence than his co-administrators, the 1st defendant herein who had filed a response. The respondent thus urged the court to find that the 2nd defendant/applicant had been properly served wherein judgment had been delivered by the court in a regular manner.
29. On the third issue for determination as to whether the 2nd defendant/applicant's application had merit, the plaintiff respondent submitted that the same lacked merit as the 2nd defendant/applicant had not satisfied the pre-requisites for grant of the orders sought since he had not demonstrated that he would suffer prejudice in the event that the said orders were not granted. That further, there had been unexplained inordinate delay in filing the instant application. Reliance was placed on the case of William Macharia Maina (*supra*).
30. He thus urged the court to find that the instant application was without merit and dismiss the same with costs to the plaintiff/respondent.

Determination.

31. Having considered the application herein seeking to set aside the judgment of the May 26, 2022, the submissions for and against allowing the said application, we shall revert to the law applicable for setting aside judgment or dismissal and which is order 12 rule 7 of the Civil Procedure Rules which stipulates that;

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
32. I have considered the reasons that were presented by the applicant/2nd defendant seeking to set aside the *ex-parte* judgment delivered on May 26, 2022, reopen their case so that he could present his evidence. I have also considered the averments herein deposed for failure to enter appearance or prosecute their defence to wit that he was not served with the summons and all other court processes hence he was unaware of the existence of the suit, until March 21, 2023 when the area chief of Tulwet location visited his homestead and informed him of the impending survey and sub-division exercise to be carried on LR No Kericho/Roret/521 pursuant to a judgment of this court
33. I have keenly perused the affidavits filed in support of the application to find out whether the applicant had valid reasons for the said failure. I took time to peruse the entire record of events that had taken place and each action since the suit was instituted in court until the entry of the Judgment herein. After judgment had been delivered in favour of the plaintiff as prayed in the plaint and a decree given on the May 26, 2022, and issued on the July 18, 2022, the 2nd defendant/applicant then filed his application dated April 11, 2023 seeking the orders as herein above stated. Of interest is that the said application



and submissions had been filed by the firm of M/S Wilson K Chirchir & Co Advocates. The provisions of order 9 rule 7 of the *Civil Procedure Rules* are clear to the effect that;

“Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.”

34. It is therefore clear that a notice of appointment of Advocates has to be filed in court and served in accordance with the provisions of order 9 rule 7 of the *Civil Procedure Rules*. In the instant matter, no such notice was filed and the firm of M/S Wilson K Chirchir & Co Advocates purporting to come on record, had sought to have the court set aside the Judgment of the May 26, 2022 and its decree thereon and to have the suit reinstated.

35. In the case of *Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi* [2012] eKLR the Court held as follows:

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

36. Indeed the issue of representation is a vital component of the civil practice and the courts cannot turn a blind eye to situations where the rules are flagrantly breached. Although the applicant has a constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under order 9 rule 7 of the *Civil Procedure Rules* above is mandatory and thus cannot be termed as a mere technicality. The firm of M/S Wilson K Chirchir & Co Advocates ought to have made a formal application to the Court with notice to all parties who participated in the suit, for grant of leave to come on record for the Applicant.

37. Having found that the procedure set out by the law under order 9 rule 7 of the *Civil Procedure Rules* was not followed by the firm of M/S Wilson K Chirchir & Co Advocates, it goes that the said firm is not properly on record and has no legal standing to move the court on behalf of the 2nd defendant/ applicant. The application before me dated the April 11, 2023 is therefore struck out with cost.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 9TH DAY OF NOVEMBER 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

