REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 50 OF 2017

BENSON W. KAOS & 72 OTHERS...PLAINTIFFS/RESPONDENTS

VERSUS

HON. ATTORNEY GENERAL..1ST DEFENDANT/RESPONDENT

THE PRINCIPAL SECRETARY

MINISTRY OF LANDS AND PHYSICAL PLANNING.........2ND DEFENDANT/RESPONDENT

THE COUNTY COMMISSIONER TRANS-NZOIA..............3RD DEFENDANT/RESPONDENT

THE DEPUTY COUNTY COMMISSIONER

TRANS-NZOIA WEST..4TH DEFENDANT/RESPONDENT

THE COUNTY LANDS REGISTRAR,TRANS-NZOIA.........5TH DEFENDANT/RESPONDENT

J.K ROTICH..6TH DEFENDANT/RESPONDENT

AND 80 OTHERS...DEFENDANTS/RESPONDENTS

RULING

(On stay of execution of judgment, setting aside a regular judgment, leave to file and serve defence)

Preliminary

1. On **18/8/2021**, the **7th - 86th** defendants filed the instant Application. They brought it under **Section 1A, 1B, 3, 3B, 3A, 63 (e)** of the **Civil Procedure Act, Order 50 Rule 1** of the **Civil Procedure Rules, Article 40, 47, 50** and **159** of the **Constitution** of Kenya **2012,** and “all other enabling Provisions of the Law.” They sought the following specific orders:

(1) …spent

(2) …spent

(3) That the proceedings in this matter and all consequential orders emanating therefrom be and are hereby set aside.

(4) That the 7th - 86th Defendants/Applicants be and are hereby granted leave to file and serve their defences jointly and/or severally out of time as it may be directed by the Honourable Court.

(5) That in the alternative to prayer (4) above, the annexed defence and counterclaim thereof be and is hereby deemed to have been properly filed and served save for filing fees payable thereof.

(6) That any other relief that this Honourable Court may deem fit and just to grant be issued.

2. The Application was premised on numerous grounds enumerated on its face and supported by a joint affidavit of **Jackline Cherugut, Veronica Ndiema, David Mwecher Chongwony, Benard C. Ngeiywo** and **Vincent M. Ngozani** sworn on **17/08/2021**. It was supported further by a joint Supplementary affidavit of **Patrick Rotich Chumo, Anthony Ngeywo Kirong, Peter Kimtai Kiben, Nancy Chebet Joseph, Joseph Ngeiwyo Dismas, Chemos Musa Ndiema** and **Robert Rungai Ngeiwyo** sworn on the same date.

The Application

3. In summary, the **7th - 86th** defendants' main contention was that they were condemned unheard because they were not aware of the existence of the case until recently on the **21/7/2021** when they were informed of it by their area Chief. They contend that they stand to be evicted from the land that belongs to them on the strength of the *ex-parte* judgment in existence.

4. They aver that they filed the instant application to enable them approach the altar of justice. Their further contention was that they would suffer prejudice if the application was not allowed. In addition, the applicants stated that justice could still be done if they were allowed to participate in the proceedings. This they stated in their 31 paragraphed Affidavit.

5. I will not reproduce each and every paragraph's contents. However, in summary, they gave a history of how they were displaced by the insecurity in Chepyuk and how the government attempted to resettle them in Chepyuk Phase II after restoration of security. They emphasized that a taskforce was formed with the purpose of resettling them. They stated further that the taskforce identified beneficiaries of the parcels of land after vetting was done.

6. They stated further that after the vetting, which involved voting, they, the **7th - 86th** defendants, were among those identified as the beneficiaries who were to be allocated land to settle on, in Patakwa Farm - the suit land herein. They deponed that the land was surveyed. They were shown their respective portions and took possession of them from then to date. They averred that they have developed their respective portions. They annexed photographs to show the developments on the land.

7. They repeated that they were never served with court papers (taken here to mean summons to enter appearance). They disputed the affidavit of service sworn on **20/3/2017** one **George Mumali**, a process server who deponed to the fact of serving them. They annexed the affidavit of service marked it as "**H**" and they urged this Court to summon the process server for purposes of cross-examination on the purported process.

8. They disputed that they saw the newspaper advertisement in which the suit and summons were advertised for the reason that Patakwa was a remote area where they could not access a newspaper. Their contention was that it was because of non-service they were condemned unheard for a mistake not theirs. They claimed that they had a strong defence and a counterclaim and they asked this court to create an opportunity to hear them. They prayed that their application be allowed.

9. In the supplementary affidavit sworn on **13/10/2021** by **Patrick Rotich Chumo, Anthony Ngeywo Kirong, Peter Kimtai Kiben, Nancy Chebet Joseph, Joseph Ngeiwyo Dismas, Chemos Musa Ndiema and Robert Rungai Ngeiwyo,** on their own behalf and on behalf of the **7th - 86th** defendants they added a few more facts. They challenged the contents of the Replying Affidavit sworn by the respondents. In particular, they denied that Edwin Busiendich Ndiema had ever stayed in Patakwa Farm and that he ever had had any business in the Patakwa Trading Centre. Thus, they attacked the affidavits of Benson Kaos and Edwin Busiendich Ndiema for being full of falsehoods.

The Response

10. The Application was opposed strongly. The Plaintiffs/Respondents filed a replying affidavit sworn by **Benson W. Kaos** on **17/9/2021**. His response was that the Application was an afterthought only designed to delay execution of this Court' judgment. His contention was that the judgment was a regular one delivered and read after full hearing. He deponed that the defendants were served by way of an advertisement as ordered by the court. Thereafter, upon their failure to enter appearance or file any defence the suit proceeded by way of formal proof.

11. Regarding the newspaper advertisement, the Plaintiffs averred that it was within the public domain since, as an example, one of the villagers from Patakwa one **Edwin Busiendich Ndiema** bought the newspaper of **12/3/2018** and that a lot of people in the farm including the area chief read the newspaper. They denied claims that the **7th - 86th** Defendants were residents of Chepyuk and stated that some of them hail from Kericho.

12. They responded further that residents of the Farm were vetted, approved and included in the final list that was prepared by the Deputy County Commissioner Cheptais, one Omar H. Salat, and the names of the Applicants were not in that list and which was genuine but instead, their names (of the Applicants) were sneaked into the fake list which was presented to the land registrar for titling.

13. In response to the affidavit of service filed by **George Mumali,** the process server, the respondents' contention was that it was only in reference to service upon the **3rd, 4th** and **5th** defendants. They denied claims that the Applicants were condemned unheard. They then deponed that the Applicants were given an opportunity to respond but they wasted their chance to participate in the suit. They denied the allegations that all the applicants could not access the newspaper advertisement.

14. The respondents prayed that the Application be dismissed as the applicants were not candid and had concealed material evidence from the court. They pointed out that the Attorney General who was a party to the suit had not been made a party to the present application.

The Respondents Supplementary Affidavit

15. The respondents filed a supplementary affidavit sworn on **17/9/2021** by **Edwin Busiendich Ndiema**. He stated that he was a resident of Patakwa Farm. He averred that he purchased a Standard Newspaper in Kitale town on **12/3/2018** and went home with it. That in it, he found the advert in respect to **ELC Case No. 50 of 2017** and that he shared the information with those who were in the farm who read it. He mentioned some of those who read the newspaper who included Joseph Chemonges, Patrick Chumo, among others. He stated further that the newspaper was within the public domain in Patakwa Farm. He attached a copy of the newspaper advert to the supplementary affidavit.

Submissions

16. This court directed the parties to dispose the application by way of written submissions which they did.

Analysis, Issues and Determination

17. I have carefully considered the application, the rival affidavits, the submissions, as well as the authorities and the law cited. I find the following issues determination:

> ***a) Whether the prayer for setting aside the judgment delivered on 27/05/2021 is merited;***
>
> ***b) Whether the Defendants should be given a chance to defend the suit, and if so, on what conditions;***
>
> ***c) What orders to issue and who to bear the costs of the Application?***

18. I will analyze them one after the other but I state that the grant of the second issue depends on the success of the first one. Thus, if the Court finds that the prayer for setting aside the judgment is merited, then it would proceed to grant the Defendants a chance to file a defence but on conditions which it would set at its discretion. It is important for the Court to bear in mind and has already done so that the power to set aside a judgment, whether regular or irregular is discretionary but very wide. Even then it should be exercised judiciously and this is what this Court shall do in the instant application.

19. As I consider the first issue, the question that I should answer first is whether the judgment herein is a regular or irregular one. In case I find that it was irregular, I have no much choice than to set it aside *ex debito justitiae,* meaning as a matter of right. This is because the rules of natural justice cannot permit a party to be condemned unheard. In ***Sangram Singh v. Election Tribunal, Koteh,*** ***AIR 1955 SC 664, at 711*** the Supreme Court of India emphasized on the importance of the right to be heard as follows***:***

> ***"[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them**."*

20. The Applicants herein voiced the same argument: that they were condemned unheard. One the other hand the Respondents contended that the Applicants were given opportunity to be heard but they squandered it hence they had themselves to blame. If it turns out that the summons to enter appearance were not served on the Applicants, then they were condemned unheard, and the judgment would be irregular. If they were served, then the judgment was regular and the Applicants were not condemned unheard: they elected to be silent. And if that be so, they had to satisfy the conditions of setting aside a regular judgment. These are better explained by the Court of Appeal in the case below.

21. In ***James Kanyiita Nderitu & another v Marios Philotas Ghikas & 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 judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed 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 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 other….***
>
> ***In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."***

22. As I look at the issue of whether or not the judgment was regular, I am reminded that where there is an irregular judgment the Court has no discretion under the rules of natural justice to act. The principles of natural justice override the discretion of a Court. In the instance Application, this suit proceeded for hearing *ex parte* or by what is referred to as formal proof, as against the Applicants. Thus, it presupposes

that they were served with summons to enter appearance but did not do so. In essence, the fact of service of summons is what the Applicants challenge. The relevant provision is **Order 10 Rule 11** of the **Civil Procedure Rules.** All the other provisions which were cited are irrelevant or inapplicable. I need not go into explaining how each applies to a different set of facts and circumstances. Suffice it to say that using **Article 159 (2) (d)** of the **2010 Constitution** I have treated the failure to cite the proper provisions and the citing of irrelevant ones a mere technicality which is cured by the said provision, but only limited to this case, since each case should be decided on its own facts. Thus, **Order 10 Rule 11** provide 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."**

23. The operative term used in the provision is "may", which imports the idea of permission and discretion. But as I have noted above, where it occurs that summons to enter appearance were not served, the Court would have no discretion in setting aside the judgment. Setting aside would be automatic. Aside from that, the Court exercises its power to set aside its judgment in a discretionary manner. The discretion is wide but it has to be exercised judicially. Even then, the purpose of the discretion is to further the ends of justice. In ***John Mukuha Mburu v Charles Mwenga Mburu [2019] eKLR*** wherein the case of ***Shah vs Mbogo [1979] EA 116*** was cited, it held that the discretion is very wide. The Court also stated thus:

> ***"......this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."***

24. In ***Patel v E.A. Cargo Handling Services Limited [1974[E.A. 75,*** cited with approval in the case of ***Stephen Wanyee Roki vs K-Rep Bank Limited & 2 Others [2018] eKLR*** the Court held as follows:

> ***"There are no limits or restrictions on the judge's discretion except that if he 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 condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."***

25. In the case of ***Esther Wamaitha Njihia & 2 Others vs. Safaricom Limited [2014] eKLR,*** the learned Judge, citing the case of ***Stephen Ndichu vs. Monty's Wines and Spirits Ltd [2006] eKLR***, held as follows:

> ***"The principles governing the exercise of judicial discretion to set aside ex-parte Judgments are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it (See Patel vs. E.A. Cargo Handling Services Ltd [1974] E.A 75). The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (See Shah vs. Mbogo [1969] E.A 116). The nature of the action should be considered, the Defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs. Gasyali [1968] E. Way. 300). It also goes without saying that the reason for failure to attend should be considered."***

26. In ***Wachira Karani v Bildad Wachira [2016] eKLR*** Justice Mativo, cited the case ***Ongom vs. Owota*** where the Court opined that for one to succeed in setting aside of an *ex-parte* judgment, the court must be satisfied with two things namely:

> ***(a) either that the Defendant was not properly served with summons; or***
>
> ***(b) that the Defendant failed to appear in court at the hearing due to sufficient cause.***

27. I have carefully analyzed the facts about service of the summons to enter appearance herein. The Court record shows that the suit was filed on **17/3/2017**. Summons to enter appearance for the other defendants from **7th - 86th** were signed on **13/10/2017** and issued the same date. It appears that the First **1st - 6th** Defendants were duly served earlier and both the memorandum of appearance and defence were filed on **22/03/2012**. Of importance is that in regard to the Applicant's position is that there appears not to have been any success in personal service of summons. Thus, the Court gave orders for substituted service on **26/02/2018**.

28. In regard to service of summons to enter appearance, the Applicants deponed in paragraphs **20** and **21** of the Affidavit sworn on **17/08/2021** that one George Mumali did not attempt to serve them with any Court papers whatsoever. They thus prayed that he be summoned for cross-examination on his Affidavit of service sworn on **20/03/2017** which they annexed to their affidavit and marked it as "**H**".

29. I keenly perused the Affidavit of service sough to be challenged, it is clear that the said document was filed on Court on **21/03/2017**. Its contents are clear that it related to the service of the Certificate of urgency, the Application dated **6/03/2017** the Plaint and summons and accompanying documents which it shows were served on the **1st - 5th** Defendants. It is clear that the parties mentioned in the Affidavit of Service entered appearance and filed defence in this matter. Nowhere does it purport to state that he served the papers on the **7th - 86th** Defendants.

30. It therefore leaves one further question: were the **7th - 86th** Defendants served with the summons and the relevant documents? The answer to that lies in the other evidence of service which followed. On **12/03/2018**, learned counsel for the Plaintiffs ran an advertisement in

The Standard Newspaper of that date. He then filed an Affidavit of service of the same on **18/04/2018**. It appears that the Office of the Attorney-General filed another Defence on behalf of the **1st - 6th** Defendants on **17/09/2018** and a list of documents on **10/02/2020**.

31. At first, the Applicants carefully avoided mentioning the service of summons to enter appearance by way of advertisement in the Standard Newspaper. It is instructive that they could single out the Affidavit of Service by George Mumali which as found above related to service of the parties who entered appearance and Defence. When the issue of service by advertisement in the dailies was raised by the Respondents, the response by the Applicants was that Patakwa area is a remote place where newspapers are unavailable. They then concentrated on attacking the veracity of the affidavits sworn by the Respondents but they failed to show precisely how the affidavits were falsehoods.

32. It is my humble and respectful finding that to the extent that the Applicants did not at first wish to acknowledge the fact that there was an advertisement of the summons to enter appearance and defence in the Standard Newspaper of **12/03/2018**, it was a design to conceal important information regarding service. Their claim about non-service was a falsehood. Moreover, it is absolutely inconceivable that a newspaper of nationwide circulation could not be read by even a single person among the **79** applicants or even their relatives. Their contention seeks to paint a gloomy picture of the existence of a place in Kenya where people are living in the 18th Century today, which is a blatant lie. It also purported to give a picture or circumstances wherein all the Applicants are neither literate nor move from their 'rural home' or moved to the nearest market place *hence are unable to know that there exists a daily newspaper* yet ALL OF THEM were able to append their signatures to the written authority to be represented. It creates doubt then of they all actually signed the written authority. Let me leave it there.

33. Substituted service by way of advertisement is provided for under **Order 5 Rule 17** of the **Civil procedure Rules**. This is what was done on the **12/03/2018** following the Court order of **26/02/2018**. In my considered view, the Applicants were properly and duly served but failed to enter appearance. Therefore, the judgment delivered herein against them jointly and severally was regular. I now move to consider whether or not the said judgment should be set aside.

34. Setting aside a regular judgment is not as a matter of right for a party moving the Court. However, it can be done, and the discretion of the Court is wide and must be exercised judiciously and on some conditions. In the case of ***James Kanyiita Nderitu*** above, the Court of Appeal set out some of the factors the Court trial Court ought to consider as it exercises its discretion. While the discretion of the Court is not to be exercised so as to cause injustice or hardship as was stated in the case of ***John Mukuha Mburu*** cited above it is not supposed to be exercised to assist one who has sought to deliberately avoid the Court process. I am of the view that the latter is the case in this matter. The Applicants knew well the existence of this Suit but deliberately failed to act and have now sought to delay justice by applying to set aside the judgment herein.

35. Their Lordships in case of ***James Kanyiita Nderitu*** held that in considering to set aside a regular judgment, the Court could take into account factors such as the reason for the failure of the defendants to file appearance or defence, the length of time taken from the time the default judgment was entered, whether the intended defence raises triable issues, the respective prejudice each party would to suffer, and whether the interest of justice demands setting aside the default judgment.

36. I have carefully considered the circumstances herein. I have also taken into account the fact that this is an old matter which is now almost seven years in the Court registries and rather than it coming to an end the Applicants seek to keep it longer. Moreover, I have weighed the justice of the totality of the circumstances herein and the prejudice each side is likely to suffer. I am of the view that justice does not demand that this matter keeps being in the Court longer than it has been. There are parties herein who are very old and wish to have their right to property settled in their lifetime. Even though the time taken from the time the judgment was delivered is not a long period, I could not have exercised my discretion in favour of the Applicants were it not that they demonstrated that they have a defence which raises one triable issue and they have a counterclaim to put forth.

37. In the circumstances and weighing all the factors in relation to the requirements for setting aside a regular or default judgment, and the prejudice occasioned to the Plaintiff's case because of granting the orders sought I exercise my discretion to and set aside the judgment delivered on **27/05/2021** on the following conditions:-

> **(i) The Applicants jointly and severally shall forthwith but not later than twenty-one (21) days of this ruling deposit into Court the sum of Kshs. 3,650,000/=, (in whichever manner but as a whole fully deposited not later than the end of the last day), being the sum total of the general damages ordered as payable to each of the Plaintiffs in the impugned judgment.**
>
> **(ii) The Applicants pay thrown away costs of Kenya Shillings sixty-five (Kshs. 65,000/=) only to the Plaintiffs within twenty-one (21) days of this ruling.**
>
> **(iii) In default of the fulfillment of the two (2) conditions above stated the orders herein shall be vacated automatically and the judgment reinstated.**
>
> **(iv) The Applicants are granted leave to file a defence and Counterclaim in terms of the annexed draft defence and Counterclaim, together with ALL their list of witnesses, witness statements, list of documents, and copies of documents within seven (7) days of depositing in Court the sum stated above. For avoidance of doubt this condition shall not take effect and should not be acted upon unless conditions (i) and (ii) above have been fulfilled.**
>
> **(v) For reason that this is an old suit, in order to avoid further delays, and subject to fulfilment of conditions (i) and (ii) above, the proceedings herein are set aside only to the extent Plaintiff's case is reopened and the two witnesses (PW1 and PW2) who testified on 9/12/2020 are recalled for Cross-Examination by the 7th - 86th Defendants and re-examination only.**
>
> **(vi) Lastly subject to the above conditions that Plaintiffs shall have leave to file a reply to defence if any, in terms of the law**

and file any lists of witnesses and documents if need be, within fourteen (14) days of service of the Applicants' documents as contained in condition (iv) above. Similarly, the 1st-6th Defendants shall have similar leave to file any documents and pleadings as appropriate, within a similar period as the Plaintiffs' and this shall run concurrently as the Plaintiffs'.

38. For purposes of proper case management, this suit shall be mentioned on **26/04/2021** for further directions.

39. The Applicants shall bear the costs of this Application.

It is so ordered.

Dated, signed and **delivered** at **Kitale via electronic mail** on this **1st** day of **March**, **2022.**

DR. ***IUR*** **FRED NYAGAKA**

JUDGE, ELC, KITALE.