



**Matoya & another v Attorney General & 4 others (Environment & Land
Case 24 of 2020) [2022] KEELC 2260 (KLR) (4 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2260 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 24 OF 2020**

JM ONYANGO, J

MAY 4, 2022

BETWEEN

BEATRICE MATOYA 1ST PLAINTIFF

TABITHA BONARERI MATOYA 2ND PLAINTIFF

AND

ATTORNEY GENERAL 1ST DEFENDANT

COMMISSIONER OF LANDS 2ND DEFENDANT

LAND REGISTRAR KISII 3RD DEFENDANT

**HENRY MANYANGE MATOYA ALIAS HENRY MATOYA MANYANGE
(ADMINISTRATOR OF THE ESTATE OF FRANCIS OBAGA MATOYA ALIAS
OTWORI MATOYA – DECEASED) 4TH DEFENDANT**

JAMES MANYANGE OBIRI 5TH DEFENDANT

RULING

Introduction

1. By a Notice of Motion dated the 3rd day February, 2022 Henry Manyange Matoya, the 4th Defendant/Applicant filed an application seeking the following orders:
 - i. Spent
 - ii. That pending the hearing and determination of this application, the Plaintiffs and/or their servants or agents or anyone claiming through them be restrained from trespassing and/or in any way interfering with the 4th and 5th Defendants' peaceful use of land parcel number Kisii Municipality/ Block 111/40.



- iii. That pending the hearing and determination of this application, the National Land Commission being the successor of the Commissioner of Lands be restrained from making any changes and/or rectifying the records including the lease for land parcel number Kisii Municipality/ Block 111/40.
 - iv. That this Honourable Court be pleased to set aside the interlocutory judgment entered herein on September 23, 2021 and all consequential orders, directions and proceedings thereto.
 - v. That this Honourable Court be pleased to grant the 4th and 5th Defendants/Applicants leave to file their Defence and defend the main suit out of time.
 - vi. That upon granting prayers (iv) and (v), this Honourable Court be pleased to issue orders in terms of prayers (ii) and (iii) above pending the hearing and determination of the main suit.
 - vii. That the costs of this application be in the cause.
2. The application is based on the grounds set out on the face of the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 3rd day of February, 2022 and the Supplementary Affidavit sworn on the February 28, 2022. In his Replying Affidavit, the Applicant depones that he was not aware of the proceedings in this matter until the January 19, 2022 when the 1st Plaintiff together with a team of five armed police officers from Kisii Central Police Station, stormed the business premises situated on the suit property and harassed the tenants in the said premises and purported to issue them with a three weeks eviction notice.
 3. He denied having been served with a notice of entry of judgment as required by the law. It was his further averment that it was only when his advocate perused the court file that he discovered the existence of the instant suit. He deponed that he was not the owner of Post Office, Box 301 Kisii which was used by the Process Server known as Silas Juma to serve the Summons to enter Appearance and pleadings as the said address belongs to one Gladys M. Ombongi who is a stranger to him. He annexed a copy of a letter from the Branch Manager Postal Corporation of Kenya, Kisii Branch indicating that the Post Box belongs to the said Gladys Ombongi.
 4. He depones that since paragraph 21 of the judgment directed the National Land Commission to consider including the names of the Plaintiffs at the time of renewal of the lease in respect of the suit property, the Plaintiffs were likely to use that part of the judgment to cause chaos to the tenants occupying the suit premises to the detriment of his family members.
 5. He stated that the suit property is currently registered in the joint names of the Applicant, Esther Nyanchama, Edward Mochama Matoya, Haron Mageka Matoya and Joseph Obaga Matoya courtesy of the Certificate of Confirmation of Grant issued in Kisii HC Succession Cause No. 290 of 2000 and that they have been in peaceful and continuous possession of the suit property since 1967 and developed it substantially.
 6. It was the Applicant's averment that since he was not served with Summons, the ex-parte judgment ought to be set aside so that he is accorded an opportunity to be heard in accordance with Article 50 of *the Constitution*.
 7. The Respondents have opposed the application through the Replying Affidavit sworn by Beatrice Matoya, the 1st Respondent on the February 21, 2022 to which she has annexed a bundle containing 51 documents.
 8. At paragraph 6 of the said affidavit, the Respondent depones that the Applicant was served with the Plaint and Summons by Silas Juma, the Kisii Law Court's Process Server pursuant to the Court's



directions issued on July 21, 2020. Thereafter, the case was mentioned several times before it was fixed for hearing ex-parte as none of the Defendants entered appearance or filed a Defence. She has annexed copies of Hearing Notices and receipts from the Postal Corporation of Kenya as proof that the Applicant was served through the Post Office.

9. The Respondent contends that the Applicant was represented by the firm of Nyasimi & Company Advocates in previous proceedings including Miscellaneous Application No. 124 of 2014 and the said advocates participated in the proceedings up to January 2020, before the Respondents filed the instant suit. She further contends that the Applicant has been using P.O Box 301 Kisii in previous suits including Miscellaneous Application No. 124 of 2014 up to October 22, 2019 when he filed a Replying Affidavit in the said suit using the said address.
10. The Respondent therefore contends that the Applicant has not made out a case to warrant the setting aside the ex-parte judgment dated September 23, 2021. She has however pointed out that she has applied to have the said judgment reviewed as she is of the view that it did not address all the issues in contention.
11. The Respondent has also provided detailed background information regarding the proceedings herein, High Court Succession Cause No 290 of 2000 and HCCC No. 255B of 2009 (OS) touching on the suit property as well as her criticism of the various rulings and judgments rendered by all the judges who have handled the said matters, but since most of the information is not relevant to the instant application, I shall not delve into it.
12. In his Supplementary Affidavit, the Applicant admits that he was represented by Mr. Nyasimi in HC Succession Cause No 290 of 2000 and HCCC No 255 of 2009 (OS) but denies that he has represented him in the instant suit as the same was not brought to his attention.
13. He contends that the 1st Respondent while riding on a temporary order issued on May 17, 2010 in HCCC No. 255B of 2009, issued a notice to his tenants to vacate the suit premises within a month thus causing panic among the said tenants. It is his contention that the said order is of no legal consequence as the suit within which it was issued was voluntarily withdrawn by the Respondents and it has never been reinstated. He therefore avers that if the Respondents are not restrained from interfering with his tenants, he will suffer irreparable or substantial loss.
14. The court directed that the application be canvassed by way of written submissions and both parties filed their submissions which I have considered.

Issues for Determination

15. The issues that arise for determination are:
 - i. Whether the interlocutory judgment dated September 23, 2021 and all consequential orders thereto should be set aside.
 - ii. Whether the Respondent should be restrained from interfering with the 4th and 5th Defendants' peaceful occupation of land parcel number Kisii Municipality/block 111/140.
 - iii. Whether the National Land Commission being the Successor of the Commissioner of Land should be restrained from making any changes and/or rectifying the records including the lease for land parcel number Kisii Municipality/block 111/140.



Analysis and Determination

16. The application dated 3rd February primarily seeks to set aside the ex-parte judgment dated September 23, 2021 on the grounds that the 4th Defendant/Respondent was not served with the Plaint and Summons to enter appearance. The Applicant also seeks orders of injunction.

17. The principles for setting aside a default judgment are fairly well settled. In the case of *Yamko Yadpaz Industries Ltd v Kalka Flowers* [2013] eKLR, Justice Havelock citing the Court of Appeal decision in *Pitboni Waweru Maina v Thuka Mugiria* Civil Appeal 27 of 1982; [1983] eKLR stated as follows:

The principles governing the exercise of the judicial discretion to set aside an ex- parte judgment obtained in default of either party to attend the hearing are as follows:

- a. Firstly, there are no limits or restrictions on the judge’s discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.
- b. Secondly, this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. *Shah v Mbogo* [1967] EA 116 at 123.
- c. Thirdly, the Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice. *Mbogo v Shah* [1967] EA 93.
- d. The court has no discretion where it appears that there has been no proper service. See *Kanji Naran v Velji Ramji* [1954] 21 EACA 20.
- e. A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically, *Smith v Middleton* [1972] SC 30

18. Furthermore, in the case of *Patel v East Africa Cargo Handling Services Ltd* [1974] EA 75 Duffus 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 the merits. In this respect defence on the 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”



19. The Court of Appeal while discussing the criteria for allowing an application for setting aside a default judgment, such as the one in this case, cited the case of *James Kanyiiita Nderitu & another v Marios Philotas Gbikas & another* [2016] eKLR and observed that:

“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 others. See *Mbogo & another v Shah (supra)*, *Patel v EA Cargo Handling Services Ltd* [1974] EA 75, *Chemwolo & Another v Kubende* [1986] KLR 492 and *CMC Holdings v Nzioki* [2004] 1 KLR 173).

The Court further stated that:

“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. (See *Onyango Oloo v Attorney General* [1986-1989] EA 456).

20. Service of Summons is provided for in Order 5 Rules 6 and 7 of the *Civil Procedure Rules* are explicit that service of summons shall be made by delivering or tendering the duplicate thereof upon the Defendant; and Rule 8(1) in particular envisages that:

“Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.”

21. In the instant case, the Applicant has stated that he was not aware of the proceedings herein until the 19th day of January 2022 when the 1st Respondent stormed the suit premises in the company of some Police Officers. This implies that he was not served with summons to enter appearance. On the other hand, the Respondent maintains that the Applicant was served with summons and all the subsequent Hearing Notices and she has annexed copies of the receipts showing that the same were sent to the Applicant’s Post Office No. 301 Kisii. Upon perusal of the court file, I have come across the Affidavit of



Service sworn by Silas Juma, the Court Process Server on September 30, 2020. At paragraph 6 thereof he depones as follows:

“That I went severally to Kemo Food behind Easy Coach Booking Office where Mr. Henry Manyange Matoya is normally found. I didn’t meet him after 5 weeks of looking for him. I sent the documents via Post Office to his address P.O Box 3010 Kisii on 14th September 2020”

22. From the said Affidavit of Service, it is clear that service was effected through Post office Box 301, Kisii. The Respondent has however denied that the said post box belongs to him. This is so despite the fact that he used the said address in previous proceedings for example his Replying Affidavit sworn on December 10, 2018 in HC Succession Cause No. 290 of 2000 which is annexed to the Respondent’s Replying Affidavit. Presumably the Applicant appears to have given up the said Post Box, as he has annexed a letter from the Postal Corporation of Kenya indicating that the Post Box belongs to one Gladys Ombongi. This has not been controverted by the Respondent.
23. If indeed the Applicant did not receive the summons that were sent though P.O Box 301 Kisii, then it must be taken that he was not served and that would imply that the judgment dated September 23, 2021 cannot be sustained. It is a principle of law that in an ex-parte judgment such as the one in the instant case, the court does not have discretion and it must set aside the judgment ex debito justitiae, as a matter of right. The rationale for this rule is that an ex parte judgment is not a judgment on the merits and where the Defendant has demonstrated that he was not served and he has expressed an interest to be heard then he ought to be accorded an opportunity to be heard. The right to a fair hearing is protected under Article 50 of *the Constitution* and it is the cornerstone of the rule of law.
24. I am also guided by the case of *Sangram v Election Tribunal Kotch* (AIR [1955] SC 664 where the Court observed that:

“There must be ever present to the mind the fact that our laws of procedure are guided 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.”
25. In light of the foregoing and in the interest of justice this is a proper case where the court ought to set aside the ex- parte judgment.
26. With regard to the prayers for injunction, the court must be guided by the principles in the case of *Giella v Cassman Brown & Company Limited* [1973] EA 358 which are as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”
27. Apart from stating the Applicant has been in possession of the suit property since 1967, the Applicant has not placed any material before the court to show that the suit property is registered in his name. Although he has annexed a Certificate of Confirmation of Grant in HC Succession Cause No. 290 of 2000 where the suit property is listed as one of the assets of Francis Obaga Matoya –Deceased, the 1st



Respondent has submitted that the lease for the suit property had expired by the time the said grant was issued in 2002 and it has never been renewed since then.

28. In his submissions learned counsel for the Applicant contended that the Applicant has raised triable issues in his Supporting Affidavit. However, I note that these are issues that will only become clear when the Applicant files his Defence and the matter is fixed for hearing so that the evidence is subjected to cross-examination.
29. Furthermore, the Applicant has not demonstrated that if an injunction is not granted, he will suffer irreparable loss which cannot be compensated by damages. That being the position, it is my finding that the Applicant has not satisfied the conditions for granting a temporary injunction.
30. I have carefully considered the Notice of Motion, the rival affidavits and annexures, the parties' submissions and the law as well as relevant authorities and principles governing the exercise of the court's discretion to set aside a judgment obtained *ex-parte* and grant orders of temporary injunction. It is my finding that the application is partially merited. Consequently, I make the following orders:
 - a. That the *ex-parte* judgment dated September 23, 2021 is hereby set aside together with all consequential orders and proceedings thereto. For the avoidance of doubt, the application for review dated October 7, 2021 is now rendered moot.
 - b. The prayer for injunction against the Plaintiffs is disallowed.
 - c. The 4th Defendant shall file his Defence within 14 days from the date hereof.
 - d. Although the 1st, 2nd, 3rd and 5th Defendants did not participate in this application, I direct that this ruling be served upon them to avoid multiple applications for setting aside. The said Defendants shall also file their Defences within 14 days after service.
 - e. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 4TH DAY OF MAY, 2022.

J.M ONYANGO

JUDGE

