



Pungu Oceanic & Construction Limited v Tsala & 13 others (Civil Suit 23 of 2019) [2022] KEELC 3068 (KLR) (4 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3068 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 23 OF 2019**

M SILA, J

MAY 4, 2022

BETWEEN

PUNGU OCEANIC & CONSTRUCTION LIMITED PLAINTIFF

AND

JUMA TSALA & 13 OTHERS DEFENDANT

(Application to set aside ex parte judgment; defendants claiming not to have been served and also asserting that they have a good defence; there being several defendants; process server stating that he served some of the defendants who then took the summons for the rest; rules requiring that all defendants be served personally or their agents be served; no evidence that the defendants served were agents of the other defendants not served; application allowed)

RULING

1. The application before me is that dated 23 December 2021 filed by the defendants. The defendants want orders to have the judgment delivered on 29 September 2021 set aside and that they be granted unconditional leave to defend the suit. The application is opposed by the plaintiff.
2. To put matters into perspective, this suit was commenced through a plaint which was filed on 13 February 2019. In the suit, the plaintiff pleaded to be the registered owner of the land parcel Mombasa/MS/Block III/640 after purchasing the land from the previous proprietors on 12 January 2018 for the consideration of Kshs. 30,000,000/=. The plaintiff pleaded that she could not however take possession as there were invaders on the land masquerading as squatters. He asked the defendants to vacate the land in vain thus this case. In the suit, the plaintiff sought orders for a declaration that she is the rightful owner of the suit land, a declaration that the defendants are trespassers, and an order of eviction against the defendants. The defendants did not enter appearance nor file defence and the matter proceeded for hearing ex parte culminating in the judgment of 29 September 2021 in favour of the plaintiff. It is this judgment that the defendants seek to set aside. The application is based on the grounds inter alia



- that the defendants only came to know of the case after being served with eviction warrants. They also contend to have a good defence as they have been on the land for more than 30 years.
3. The supporting affidavit is sworn by Juma Tsala, the 1st defendant. He has deposed that on 2 December 2021, they were served with warrants of eviction in respect of the suit property. He asserts that they were hitherto not aware of the case. He contends that there was no service of summons and faults the affidavit of service filed for not disclosing how the process server identified the defendants. He has deposed that in the circumstances they will require the process server to come to court for cross-examination. He avers that they have an arguable defence of adverse possession. Some photographs of what is alleged to be the suit land are annexed. He further claims that the documents of the plaintiff are forgeries and avers that the land had been set aside by the County Government of Mombasa for solid waste management and that the previous owners were aware of this. He has annexed a letter said to be from the County Executive in charge of lands, Mombasa County. He has also stated that no notice of entry of judgment was issued before the warrants of eviction.
 4. The plaintiff has opposed the application through the replying affidavit of Adan Maalim Hussein. He has deposed that the defendants have not exhibited any proof to demonstrate that the plaintiff's title is a forgery. On the letter said to be from the County Executive in charge of lands, he has stated that he is not aware of such a letter. He has also questioned the locus of the defendants if they assert that the land is meant for solid waste management. He has argued that they cannot have a claim over the land if this is the position. He has asserted that the defendants were served with court documents but ignored them only rushing to court after being served with warrants of eviction. He has contended that the defendants have not been on the land for more than 30 years and on the photographs annexed, he has urged that some demonstrate very recent construction.
 5. A supplementary affidavit was filed by the defendants again sworn by Juma Tsala. He has reiterated that the plaintiff has no title as the previous proprietors had no title to pass because "the land is Government land which has been in use for various project (sic) beneficial to the Community such as school and health (sic) centers which the County Government has set aside for solid waste disposal and has never changed the usage and or allocating the land to citizens." He stated that on 22 January 2016, they lodged a petition to the National Land Commission to investigate and determine the legality of the title issued. He has annexed a copy of the alleged petition. He has deposed that on 5 March 2015 the National Land Commission (NLC) wrote to the County Government of Mombasa to assess the property. The said letter is annexed. He states that they then lodged a complaint to the Ombudsman who wrote to the County Government of Mombasa for investigations. He has annexed copies of letters written by the Ombudsman dated 12 April 2018 and a reply from the Adjudication and Settlement Officer dated 16 April 2018. He asserts that the plaintiff's title is unlawful because the land has never been allocated to any person and that if it was allocated to the plaintiff or the persons who sold the land to the plaintiff, then the process was illegal "because the procedure is to allocate land to the people on the ground." He claims that they have a good defence to warrant going to trial.
 6. In his submissions in support of the application, counsel for the applicant submitted that the affidavit of service should have stated how the process server identified the person he served and how he identified the location. He urged that the defendants were not served. He also submitted that the defendants have an arguable defence and he referred me to the draft annexed defence. He closed by submitting that the application should be allowed to enable the defendants exercise their constitutional right to a fair hearing in accordance with Article 50 of *the Constitution*.
 7. On his part, counsel for the plaintiff/respondent submitted that the plaintiff has demonstrated title and is thus the absolute owner of the suit property. On the claim that the defendants have a good defence, counsel pointed out that the defence that the defendants wish to raise is that the suit land is



Government land and they cannot sue on behalf of the Government. He submitted that they have no locus to sue for the Government. He wondered what prejudice they will suffer if their application is not allowed. He submitted that though the defendants claim that the plaintiff's title is not genuine, they have themselves not displayed a separate title. He further submitted that the defendants have made no claim for adverse possession.

8. I have considered all the above. The position in this case is that the matter proceeded ex parte because the defendants entered no appearance and filed no defence. They claim that they were never served with summons and secondly that they have a good defence which merits them being given a chance to be heard. I will first assess the allegation by the defendants that they were never served with summons because if I find that this is the position, then I will have to set aside the judgment ex debito justitiae.
9. I have looked at the affidavit of service. It is sworn by one Alex Philip Nzuki, a licenced court process server. He states that he received summons and other filed documents on 3 April 2019 at around 11.00am. He then goes further to state as follows :-

That on the same day at about 3.30 pm I proceeded to Likoni an area known as Pungu fuel where the defendants resides (sic). Upon arrival at around 4.30 pm I found the 9th defendant Mr. Abdalla Hamisi Maruru whom I introduced myself to and the purpose of my visit. After introduction I tendered/delivered to him the above quoted documents which after perusing he contacted the other defendants number 10, 11, 12 and 13 whom he told me that they are the one manning the plot. When they came they collected all the documents I had on behalf of the other defendants and told me to leave the area immediately. I left the application, summons and pleadings in this case upon the 9th 10th 11th and 12th defendants on behalf of the other defendants on 3rd day of April 2019. They were identified to me by one of the directors of the applicant Mr. Aden and admitted that they were part of the defendants named herein above.

10. From the above, it will be seen that the process server served only the 9th, 10th, 11th and 12th defendants. The summons for the other defendants are said to have been taken. Was this good service ? Order 5 Rule 7 touches on service where there are several defendants. It provides as follows :-

7. Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.(emphasis mine).

11. In this case, service was not made on each defendant as admitted by the process server. Of course the law allows other persons to be served on behalf of a defendant but this will only apply where the person served is an agent of the defendant. This is covered in Order 5 Rules 11 and 12 which are drawn as follows :-.

Rule Service on agent in charge in suits for immovable property

11 : Where, in a suit to obtain relief respecting, or compensation for wrong to, immovable property, service cannot be made on the defendant in person, it may be made on an agent of the defendant empowered to accept service or on the agent of the defendant in charge of the property.

Rule Service on agent or adult

12 : Where in any suit, after a reasonable number of attempts have been made to serve the defendant, and defendant cannot be found, service may be made on an agent of the defendant



empowered to accept service or on any adult member of the family of the defendant who is residing with him.

12. In our case, the process server could not have used Rule 12 above, for no service was effected on an adult member of the families of the defendants. At best, he could have used Rule 11, that is, service effected on an agent of the defendant empowered to accept service or on the agent of the defendant in charge of the property. I however have no evidence that the person/s served acted as an agent of the other defendants or that the person/s served were actually in charge of the property. There is no evidence presented on what it is that the process server perceived so that it can be conclusively determined that the person/s served was/were actually in charge of the property. I do not think that merely being told by a person that he/she is the one in charge in the circumstances of this case was sufficient. I am persuaded that service was not proper on all defendants. It could be proper for the 9th, 10th, 11th and 12th defendants but not for the rest. I am therefore moved to set aside the judgment ex debito justitiae in respect of all the defendants save for the 9th, 10th, 11th and 12th defendants. I note however that it is a group that has been sued and since I have set aside judgment in respect of some of the defendants, in my discretion, I will also allow the 9th, 10th, 11th and 12th defendants to also defend the suit against them.
13. The result is that the judgment of 29 September 2021 is hereby set aside. The defendants are hereby directed to formally file and serve their defence within 14 days from the date hereof.
14. Costs of this application will be costs in the cause.
15. Orders accordingly.

DATED AND DELIVERED THIS 4 DAY OF MAY 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

