



**Ahmed v Ahmed (Environment & Land Case 216 of 2016)
[2022] KEELC 3908 (KLR) (12 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3908 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 216 OF 2016**

**MAO ODENY, J
JULY 12, 2022**

BETWEEN

ABUU MOHAMED AHMED PLAINTIFF

AND

ABDULRAHMAN MOHAMED AHMED DEFENDANT

RULING

1. This Ruling is in respect of a Notice of Motion dated July 27, 2021 by the Defendant/applicant is seeking the following orders:
 1. Spent.
 2. That this Honourable Court be pleased to set aside its *ex-parte* judgment dated signed and delivered on the January 18, 2019 and its decree issued on January 28, 2019 and that this suit be ordered to start afresh and/or *de novo*.
 3. That the defendant be granted leave to defend the suit and that the annexed draft defence herein be deemed to be properly on record upon the payment of the requisite filing fees.
 4. That there be a stay of execution of the decree of this court given on the January 18, 2019 and issued on the January 28, 2019.
 5. That the cost of this application be provided for.
2. Counsel agreed to canvas the application by way of written submissions which were duly filed.



Defendant/applicant's Submissions

3. The applicant relied on the grounds on the face of the application and the supporting affidavit sworn on July 27, 2021 by the Defendant where he deponed that the Plaintiff who is his brother, instituted this suit on August 23, 2016 over a plot of land located at Majengo Mapya area in Malindi.
4. That the suit was heard and determined ex-parte without his knowledge and he only became aware of this suit when he was served with an application for eviction dated June 15, 2021. The applicant further deponed that he was never served with any summons regarding this suit and that the affidavit of service was filled with falsehoods.
5. In response to the application, the respondent filed a replying affidavit on 22nd September 2021 where Hussein Mohamed Ahmed deponed that the Defendant was duly served with the summons on 24th August 2016 and the subsequent hearing and judgment notices. That the Defendant did not even respond to the application for execution or seek stay thereon until when warrants were issued and served. He also stated that the defence does not raise any triable issues and that the present application was devoid of merit.

Defendant/applicant's Submissions

6. Counsel submitted that The Defendant/Applicant's main contention is that he was never served with any pleadings whatsoever and that he only became aware of this suit after being served with the application dated June 15, 2021 seeking possession and eviction orders.
7. Further that the two Court process servers Samson N. Nyangena and Morris Mwavua Ngonyo who allegedly served the Defendant/Applicant herein were cross-examined on oath on various dates and it turned out that both process servers were not licensed to serve Court documents as at the time of the alleged service upon the Defendant/Applicant. Both of them could not identify the premise place where the Applicant lived as at the time of the alleged service.
8. Counsel submitted that one of the process servers Samson N. Nyangena during cross examination based on the affidavit of service sworn on August 26, 2016 was not able to identify and name of the person whom he claimed accompanied him to serve the Applicant as the Applicant was not known to him as at the time of service as well as he was unable to identify the time of service upon the Defendant/Applicant contrary to Order 5 Rule 15 (1) of the Civil Procedure Rules 2010.
9. Mr Mbura submitted that the applicant cannot be denied a chance to be heard which is contrary to the Article 50 (1) of the constitution which provides for the principles of natural justice. Further that there was no proof of service as is required under Order 5 rule 13 which requires such a process server to satisfactorily explain why a person did not sign any of the documents.
10. Counsel relied on the cases of Mohamed & another v Shoka Civil Appeal No 163 of 1989; and Patel v Cargo Handling Services Limited [1974] EA 75 quoted in Multiscope Consulting Engineers v University of Nairobi & Another [2014] eKLR where the respective courts laid down the test for the correct approach in applications for setting aside *ex parte* judgments or orders.
11. Counsel submitted that the applicant's defence has triable issues the applicant being a beneficial owner of the suit property having purchased the same from Mohamed Hussein together with his other brother Ali Mohamed Ahmed; and single handedly building the 4-bedroom house thereon. That he only let the Plaintiff, his brother utilize the 2 bedrooms for residential purposes only.



12. Mr Mbura submitted that the application was filed without any unreasonable delay and that there will be no prejudice occasioned to the Plaintiff if the judgment is set aside.

Plaintiff/respondent's Submissions

13. Counsel for the plaintiff submitted that the Defendant had not demonstrated sufficient cause to warrant this court exercise its discretion in its favour and relied on the cases of *Shah v Mbogo & another* [1967] EA 116; *Joswa Kenyatta v Civicon Limited* ELRC Cause No. 1485 of 2016; *James Kanyita Nderitu & another v Marios Philotas Ghikas & another* Civil Appeal No. 6 of 2015 cited in the case of *Grace Cherotich Kemboi v Simon Kipkoech Ngotwa & another* ELC NO. 54 of 2013 and urged the court to dismiss the application with costs.

Analysis and Determination.

14. The issue for determination is whether the defendant was served with the summons to enter appearance and whether the court should set aside the judgment dated 18th January 2019 and decree issued on January 28, 2019.
15. Service of summons to enter appearance and plaint upon the Defendant in a suit is crucial and it is meant to alert or inform a litigant that he/she has been sued to enable them respond within a stipulated. A matter cannot proceed if summons have not been served and that is why there are elaborate procedures in the *Civil Procedure Rules* on how to serve summons and the effect of not serving.
16. Order 10 Rule (2) of the *Civil Procedure Rules* provide for Affidavit of Service upon non-appearance as follows: -
- "Where any defendant fails to appear and the plaintiff wishes to proceed against such defendant, he shall file an affidavit of service of summons unless the summons has been served by the process server appointed by the Court."
17. Further, Order 5 rule 15(1) provides as follows:
- "The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require."
18. The process servers were summoned to court to explain how they served the defendant but both of them admitted that at the time of the service they were not licensed to serve court processes and that they did not indicate the time when they served the summons.
19. The affidavit of service by of service sworn by Samson N. Nyangena on August 26, 2016, confirms that it did not comply with the provisions of Order 5 rule 15 where he was supposed to indicate the name of the person who identified the Defendant and the time of service.
20. In the case of *Said Abdala Azubedi v Samuel Mbugua Ikumbu* [2018] eKLR the court held that such affidavits of service contravene Order 5 rule 15 (1).



21. Order 10 rule 11 of the *Civil Procedure Rules* states:-

"Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree order upon such terms as are just."

22. It is trite law that an order made without service of summons to enter appearance is a nullity which must be set aside *ex debito justitiae*. This position was confirmed by the Court of Appeal in *James Kanyita Nderitu -v- Maries Philotas Ghika & Another* [2016] eKLR, cited to me by the Plaintiff/respondent, where it was held:

"We shall first address the ground of appeal that faults the learned Judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the 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 appearances 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 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 (see *Mbogo & Another V Shab* (supra); *Patel V EA Cargo Handling Services Ltd* [1975] EA 75, *Chemwolo & Another v Kubende* [1986] KLR 492 and *CMC Holdings v Nzioki* [2004]1 KLR 173)."

23. I had the opportunity of hearing the evidence of the process servers who admitted that they failed to comply with the rules that pertain to service of processes and the filing of the affidavit of service. I find that this is a case where the court has to exercise its discretion in favour of the applicant and set aside the judgment and decree dated January 18, 2019 and January 28, 2019 respectively. The application is allowed as prayed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF JULY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

