



**Kanyiri v Wamuyu (Environment and Land Case Civil Suit
504 of 2016) [2022] KEELC 2509 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2509 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 504 OF 2016**

OA ANGOTE, J

JULY 7, 2022

BETWEEN

PETER KIMANI KANYIRI PLAINTIFF

AND

PRISCILLA WAMUYU DEFENDANT

RULING

Introduction

1. Before this Court for determination is the Defendant's/ Applicant's Notice of Motion application dated 18th October, 2021 brought pursuant to the provisions of Sections 1A and 1B of the *Civil Procedure Act*, 2010 and Order 5 Rule 16, Order 10 Rule 11 and Order 22 Rule 6 of the *Civil Procedure Rules*, 2010. The application seeks the following reliefs;
 - i. That this Honourable Court be pleased to grant an order of stay of execution of the decree issued on 22nd January, 2021 pending the hearing and determination of the suit.
 - ii. That this Honourable Court be pleased to set aside its ex-parte judgment in default of Appearance and Defence entered on the 20th July, 2017 and final judgment entered on 18th September, 2019, the Decree issued on 22nd January, 2021 together with all consequential orders
 - iii. That the Defendant be granted unconditional leave to defend the suit and be allowed to file her Defence in terms of the Draft statement of Defence attached hereto.
 - iv. That this Honourable Court be pleased to order the examination on oath of Christopher Githu, a process server on the contents of his purported Affidavit of service sworn on the 11th October, 2016.
 - v. That the costs of the Application be borne by the Plaintiff/ Respondent.



2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Priscilla Wamuyu, the Defendant herein, who deponed that on 18th August, 2021, she received vide WhatsApp messages undated copies of an application for execution, a Notice to Show Cause why she should not be arrested and committed to civil jail as well as a text message from David Okoyo Ondieki & Associates informing her that the Notice to Show Cause was scheduled for hearing on 6th December, 2021.
3. The Defendant deponed that she was surprised by the documents aforesaid having been unaware of the suit; that she instructed her counsel whom upon perusing the court file noted that interlocutory judgment had been entered against her on 20th July, 2017 and final judgment delivered on 18th September, 2019 and that the deposition vide the Affidavit of Service sworn on 11th October, 2016 by Christopher Githui averring that the Plaintiff and the accompanying documents were served upon her through the Chief's office at Kariobangi were untrue.
4. The Defendant deponed that she has never resided in Kariobangi nor anywhere else in Nairobi but has always been a resident of Maragua town and that even after obtaining ex-parte judgment, the Plaintiff never served her with the Notice of Entry of Judgment before commencing execution contrary to Order 22 Rule 6 of the *Civil Procedure Rules*.
5. The Defendant deponed that she is the registered owner of the suit properties being Plot Numbers A375 & A376 having been registered as such on 16th November, 2011; that she purchased the suit property from Umoja III Housing Settlement Scheme where she is a member; that the Plaintiff is neither a member of Umoja III Settlement Scheme nor the original registered owner of the suit property and that Mr. Arthur Sambaya, from whom the Plaintiff claims to have bought the suit property, is a well-known fraudster. It was her deposition that she has a good Defence and that the interests of justice dictate that she is given an opportunity to defend the suit.
6. In response to the application, the Plaintiff deponed that the Defendant's allegations of non-service are unmerited; that she was duly served with court process; that upon entry of judgment on 18th September, 2019, the Defendant was duly served with copies of the said decree on or about 26th January, 2021 and that despite service of the court orders, the Defendant has entered upon the suit property and removed the Plaintiff's building materials.

Cross-examination of the process server

7. When the application came up for hearing on 6th December, 2021, the court granted the prayer which sought for the cross-examination of the process server. During cross-examination, the process server testified that he swore the Affidavit of 11th October, 2016; that on 24th May, 2016, he went to Maragua Hospital where he found a nurse who told him that there is a nurse called Priscilla and that he did not keep the bus receipt nor any evidence to show that he travelled to Maragua on the said date.
8. It was the evidence of the process server that he found the nurse in charge at Maragua Hospital but did not write down her name; that the aforesaid nurse gave him information about the Defendant's whereabouts and that it was the Advocate who told him that the Defendant is a nurse.
9. PW1 informed the court that on checking the hospitals' register, he did not find the Defendant's name; that the Chief, whose office is located at Kariobangi South, called the Defendant and that the Chief did not tell him his name. It was the evidence of PW1 that it is the Chief of Kariobangi South who pointed out the Defendant to him; that he inadvertently forgot to indicate the time of service and that he does not remember the exact time of service.



10. It was the evidence of the process server that whereas the Chief witnessed the service of the documents on the Defendant, he did not indicate anywhere that he (the Chief) witnessed the said service; that the Chief informed him that the Defendant lived in his jurisdiction but did not state her exact address and that the Chief called the Defendant upon whom he served the court documents.

Submissions

11. The Defendant/Applicant submitted that during cross-examination, it emerged that the process server was unable to show proof of having served the Defendant with the court process on 21st June, 2016 contrary to Order 5 Rule 15 of the Civil Procedure Rules; that contrary to Order 22 Rule 6 of the Civil Procedure Rules, the Plaintiff did not serve the Plaintiff with the Notice of Entry of Judgment and that as such, any purported execution was *void ab initio*. Reliance in this regard was placed on the case of Spanish Coach Express Ltd vs Pride Fuels Limited [2019] eKLR.
12. The Plaintiff/Respondent submitted that the Defendant does not dispute service of summons but only states that the time of service was not indicated in the Affidavit; that judgment was entered regularly after formal proof hearing; that the Applicant deliberately ignored court summons in order to enable her continue construction on the suit property and that the Defendant is not entitled to the orders sought.
13. Reliance was placed on the cases of Nesco Services Limited vs CM Construction EA Limited[2021] eKLR, Makwere Chirau Ali vs Ayub Juma Mwakesi & 2 Others Civil Appeal No 80 of 2008 and Union Insurance Co of Kenya Ltd vs Ramzan Abdul Dhanji, Civil Appeal No 179 of 1998 where the courts found that persons who deliberately failed to comply with the rules of the court and obstruct or delay justice were not entitled to discretionary orders by the court and that the issues raised by the Defendant are mere technicalities and mistakes by the process server which should not be visited on the Plaintiff.
14. Counsel for the Plaintiff submitted that the Defendant has not indicated that she is willing to pay security for costs should the matter start afresh; that the Defendant cannot benefit from the court's discretionary powers to set aside default judgment as provided for under Order 10 Rule 1 of the Civil Procedure Rules, 2010 and that the Defendant was aware of the judgment which was served to her through her mobile number.

Analysis & Determination

15. Having considered the pleadings and submissions herein, the issues that arise for determination are;
- i. Whether or not service was properly effected upon the Defendant?
 - ii. Whether or not the Judgment entered on 18th September, 2019 was proper and regular and if so? whether there exists good grounds to set it aside.
 - iii. Whether the draft Defence raises triable issues.
16. The Defendant's case is that she has never been served with any court process and was unaware of the proceedings up until she received a Notice to Show Cause. In response, the Plaintiff contends that the Defendant deliberately ignored court summons and is now attempting to benefit from her inaction in the matter even after been served with the summons to enter appearance.



17. The Courts' jurisdiction to set aside ex-parte judgment is found in Order 10 Rule 11 of the [*Civil Procedure Rules*](#) which provides;

“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.”

18. It is clear from the foregoing that the court's power to set aside ex-parte judgment is discretionary in nature. This was affirmed by the Court of Appeal in [*Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd vs Augustine Kubede*](#) (1982-1988) KAR, where the Court held:

“The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties.”

19. The exercise of this discretion is not intended to aid a person who deliberately seeks to obstruct justice but to avoid hardship resulting from an accident, or excusable mistake or error. As aptly expressed by the Court of Appeal of East Africa in the case of *Shah vs Mbogo & Another* (1967) EA 116;

“The discretion to set aside an ex-parte judgment 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 a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

20. It is now settled law that in applications of this nature, the court's first port of call is a determination as to whether the default judgment was regular or irregular. This distinction is crucial because where judgment is found to have been irregular, the court has no discretion to set aside the same but must do so ex debito justitiae. This position was confirmed by the Court of Appeal in [*James Kanyita Nderitu v Maries Philotas Ghika & Another*](#) [2016] eKLR where it was held:

“...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 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 (see *Mbogo & Another V Shah* (supra); *Patel V EA Cargo Handling Services Ltd* [1975] EA 75, *Chemwolo & Another V Kubende* [1986] KLR 492 and *CMC Holdings Vs Nzioki* [2004]1 KLR 173).

In an irregular 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). The Supreme Court of India forcefully underline the importance of the right to be heard as follows in *Sangram Singh V Election Tribunal, Kotch*, AIR 1955 SC 664, at 711:

“There must be never present to the mind the fact that ours 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 precluded from participating in them.”

21. By way of a brief background, the Plaintiff instituted this suit against the Defendant vide a Plaint filed on 12th May, 2016 seeking, inter-alia, for injunctive orders restraining the Defendant from interfering with the suit property. On 13th July, 2017, the Plaintiff filed a request for interlocutory judgment. The interlocutory judgment was entered and the matter was set down for formal proof. After hearing the matter, the court entered final judgment on 18th September, 2019 where it found in favour of the Plaintiff.
22. According to the Defendant, she has never been served with any court process and only became aware of the suit upon service of a Notice to Show Cause why she should not be committed to jail for disobedience of court orders and that upon receipt of the same, she instructed counsel who perused the file and found that judgment had been entered on 18th September, 2019.
23. The manner of service of court process on a Defendant is laid down under Order 5 Rule 8 of the [*Civil Procedure Rules*](#) which provides as follows;
 - “ 8. Service to be on defendant in person or on his agent.
 - 1) 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.
 - 2) A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.”
24. According to the Affidavit of 11th October, 2016, on 21st June, 2016, the process server received information that the Defendant was at Kariobangi South Nairobi Chief’s Office; that he went to the Chief’s office at Kariobangi who informed him that he knew the Defendant and that the Chief called the Defendant who responded and came to the Chief’s office where she was personally served her with the summons but refused to acknowledge receipt.
25. During cross-examination, it emerged that the process server did not indicate in the Affidavit of service the location of the Chief’s office or his name, or the fact that it is the Chief who identified the Defendant. The Affidavit of service does not also indicate the time of service, nor is it indicated anywhere that it is the chief who witnessed the service.



26. Order 5 rule 15(1) of the Civil Procedure Code states 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 name address of the person (if any) identifying the person served and witnessing the delivery or tender of summons.”

27. To the extent that the Affidavit of service does not indicate the person who pointed to the process server the Defendant, and the time he purportedly served her, it follows that the Affidavit of service is wanting in the crucial details underlined above and falls short of the provisions of Order 5 Rule 15(1). Warsame J (as he was then) when faced with a similar situation in the case of National Bank of Kenya vs Peter Oloo Aringo (2004) eKLR stated as follows:

“The legal requirement is that a process server should specify the time and date when he serves the document as well as the person who points out the alleged residence of the person to be served in compliance with Order 5 of the Civil Procedure Rules. Failure to comply with the provisions set out in Order 5 of the Civil Procedure Rules make any such service defective. If there is no proper service, there is no regular judgment”

28. The distinction between a regular and irregular judgment was aptly explained by Njagi J in the case of Fidelity Commercial Bank Ltd vs Owen Amos Ndung'u & Another HCCC NO. 241 of 1998 (UR) cited with approval in K-Rep Bank Limited [2017] eKLR where he stated as follows:

“A distinction is drawn between regular and irregular judgments. Where summons to enter appearance has been served, and there is default in the entry of appearance, the ex-parte judgment entered in default is regular. But where ex-parte judgment sought to be set aside is obtained either because there was no proper service or any service at all of the summons to enter appearance, such a judgment is irregular, and the affected defendant is entitled to have it set aside as of right.”

29. Having found that there was no proper service, it follows that the judgment entered against the Defendant was irregular and as such the same should be set aside ex debito justitiae.

30. Having found that the judgment entered against the Defendant was irregular on account of defective service, and the same having been set aside ex debito justitiae, the court is not required to determine the question of whether or not the Defence raises triable issues. This court will however proceed to determine the same for purposes of completion.

31. The Court of Appeal case of Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono (2015) eKLR in defining what a triable issue is observed that:

“A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”



32. In the Ugandan case of *Sebei District Administration vs Gasyali* [1968] EA 300,301,302 the court adopted the reasoning in *Jamnadas Sodha vs Gordandas Hemraj* (1952) 7 ULR 7 where it was stated:

“The nature of the action should be considered, the defence if one has been brought to the notice of the court, however, irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court.”

33. The Court has considered the Plaintiff and the draft Defence attached to the Defendant’s Supporting Affidavit. The Plaintiff states that he is the registered owner of Plot Numbers A 375 and A376 which the Defendant has trespassed upon. On the other hand, the Defendant in her draft Defence challenges the Plaintiff’s ownership of the suit plot contending that it rightfully belongs to her. That being the position, the court is persuaded that the Defence raises triable issues that should be considered at a full hearing.

34. In conclusion, the court allows the Defendant’s application dated 18th October, 2021 as follows:

- a. The Judgment dated 18th September, 2019 together with the consequential decree and all ex parte proceedings be and are hereby set aside.
- b. The Defendant be and is hereby granted unconditional leave to defend the suit and is allowed to file her Defence in terms of the Draft statement of Defence within 14 days.
- c. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 7TH DAY OF JULY, 2022

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Ondieki for the Plaintiff

Mr. Kariuki for the Defendant

Court Assistant - June

