



REPUBLIC OF KENYA



**Kavoo v Dennis (Environment & Land Case 44 of 2019)
[2022] KEELC 2784 (KLR) (6 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2784 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 44 OF 2019**

CG MBOGO, J

JULY 6, 2022

BETWEEN

KIMUYU KAVOO APPLICANT

AND

PRISCA NDUKU DENNIS RESPONDENT

RULING

1. The application for determination is dated 25th May, 2021 and was filed under certificate of urgency. It is brought under Article 159(1) (a) (2) of *the Constitution*, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 45 Rule 1 of the *Civil Procedure Rules* (CPR) 2010 and all other enabling provisions of the Law. It seeks: -
 1. Spent.
 2. That the honorable Court be pleased to review and/or set aside the orders issued on 28th February, 2020 and reinstate the status quo pertaining on the suit land prior to the filing of the suit and he be allowed to file all the necessary pleadings pending the hearing and determination of this application.
 3. Spent.
 4. Spent.
 5. That this honourable Court be pleased to summon the Kibwezi Sub County Land Adjudication and Settlement Officer.
 6. That costs of the application be in the cause.
2. The application is supported by the grounds on its face and the applicant's supporting affidavit sworn on the same date. The applicant deposed that the matter proceeded undefended and that service of



summons and Court process is disputed. That the suit parcels of land are under Nguu Settlement scheme which had many challenges to the extent that a task force was formed in 2006 to resolve the issues. That it was discovered that there were discrepancies in the way the settlers occupied their plots on the ground and how they appear on the map. A letter dated 20th May, 2021 is exhibited as KK1. He deposed that the land adjudication and settlement officer should be summoned to explain the extent of the discrepancies and whether the final outcome of the report could affect the determination of the case.

3. It is also his deposition that he holds title to the land where he resides and not the land represented by the title held by the respondent. That owing to the existing disputes, it is impossible to conduct an official search at the lands registry hence difficult to adduce documentary evidence proving ownership. That he has been evicted from his own land and his family will be rendered homeless if the prayers sought are not granted.
4. Further, he deposed that he was critically ill at around the period of the suit and as such, he was unable to respond to the suit papers and attend Court. That he was admitted in hospital thus could not accept service as alleged. It is also his deposition that illiteracy and inability to understand the English language prevented him from comprehending the consequences of Court decisions and processes.
5. He deposed that there are two different dates indicated on the judgment and it is necessary that the same be rectified. A copy of the judgment is exhibited as KK2. It is also his deposition that his case has merit and raises triable issues. A draft defence is exhibited as KK3.
6. The application is opposed through the respondent's replying affidavit sworn on 02nd June, 2021. The gist of the opposition is that the applicant was served with the summons to enter appearance as well as all the Court dates and documents that followed thereafter. An affidavit of service for the initial service is exhibited as PND1. A mention notice to attend Court on 01st October, 2019 and its affidavit of service are exhibited as PND2. A letter dated 02nd March, 2020 informing the applicant about the judgment is exhibited as PND3. PND5 are documents relating to taxation of costs and attachment of the suit property.
7. The respondent deposed that the applicant was eventually committed to civil jail for failing to satisfy the decree on costs. Further, she deposes that on 17th May, 2021, the applicant honestly told the Court that he had been served with the suit papers and he visited the Makueni ELC Registry where he was advised to hire a lawyer but could not afford one.
8. She deposed that this application has been overtaken by events because the applicant has already been evicted from the suit property and his houses demolished. Photographs to that effect are exhibited as PND6. That the suit land is registered land with a title deed and as such, a land adjudication officer lacks jurisdiction. That the applicant should have attached a surveyor's report if indeed he had not occupied land parcel Makueni/Nguu Ranch/924.
9. Further, the respondent deposed that no medical documents have been availed to prove that the applicant was severely ill. It is also her deposition that the applicant has not applied to cross examine the process server and that setting aside the judgment will be an academic exercise.
10. Directions were given that the application be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.



11. The applicant submitted that the principles governing the setting aside of an ex-parte judgment were set out in the case of *Shah -vs-Mbogo & Anor* (1967) EA where the Court of Appeal for Eastern Africa held that:-

“..applying the principle that Court’s 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 not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused.”
12. He has also cited the case of *James Kanyita Nderitu & Anor -vs- Marios Philotas Ghikas & Anor* (2016) eKLR where the Court held that:

“ In a regular default judgment, the defendant will have been duly served with the 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 jurisdiction in determining whether or not to set aside the default judgment and will take into account such factors as the reason for the failure by the defendant to file his memorandum of appearance and defence, as the case maybe; the length of time that lapsed 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 interests of justice to set aside the default judgment among other....”
13. He submitted that from the draft defence, it is evident that there are discrepancies in the subject land with regard to the way the settlers occupied them on the ground and how they appear on the map. He cited the case of *Tree Shade Motors Ltd -vs- DT Dobie & Anor* (1995-1998)1EA 324 where it was held that:

“ Even if service of summons is valid, the judgment will be set aside if the defence raises triable issues. Where a draft defence was tendered with an application to set aside a default judgment, the Court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff’s claim. Where a defendant showed a reasonable defence on merits, the Court could set the ex-parte judgment aside.”
14. Relying on Order 45 Rule 1 of the *Civil Procedure Rules*, the respondent submitted that the application does not satisfy the conditions of review. That the applicant has not demonstrated the discovery of new and important matter or evidence which was not within his knowledge after exercise of due diligence.
15. With regard to the prayer for setting aside of the default judgment, she submitted that the discretion of the Court to grant it is a free one and is intended to be exercised to avoid injustice but not to assist a person guilty of trying to obstruct or delay the course of justice. She submitted that even where a regular judgment has been entered, the Court will not set it aside unless satisfied that the defence raises triable issues.
16. She submitted that the statement of defence does not show how the applicant acquired the land and that from the applicant’s own admission; he was aware of the ongoing suit but chose to take it lightly.



17. With regard to the prayer to summon the land adjudication and settlement officer, she relied on section 4 of the *Land Adjudication Act* to submit that the suit land is not under adjudication hence the said officer will not assist the Court in any way.

18. With regard to the prayer for review, Order 45 Rule 1 of the *CPR* provides that:-

- “ 1) Any person considering himself aggrieved-
- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.”

19. Having looked at the application and the supporting affidavit, it is clear that the conditions for grant of review have not been satisfied.

20. With regard to the prayer for setting aside of the judgment, Order 10 Rule 11 of the *Civil Procedure Rule* provides that;

“ 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.”

21. The applicant has disputed service of summons and Court process. On the other hand, the respondent maintains that all the Court documents and dates were properly served. I have perused the Court record of 17th May, 2021 and have not seen any admission by the applicant with regard to service. However, I have looked at all the affidavits of service once again and I am convinced that indeed, the applicant was duly served. In any case and as correctly submitted by the respondent, the applicant has not applied to cross examine the process server. Accordingly, the default judgment entered is regular and the next thing to determine is whether the defence raises triable issues.

22. In the draft defence, the applicant avers that a task force was formed to resolve the issues of Nguu Settlement Scheme and it was discovered that there were discrepancies in the way the settlers occupied their plots on the ground and how they appear on the map. It is also his averment that the verification exercise by the task force was meant to be completed in June 2021. If that is the position, the verification exercise should be complete by now and since the applicant insists that he was evicted from his own land, the just thing to do is to afford him an opportunity to prove his claims. The issue of whether or not the applicant was evicted from his own land is triable and I am inclined to set aside the default judgment.

23. As to whether the Court should summon the Land Adjudication and Settlement Officer, section 4 of the *Land Adjudication Act* provides as follows with regard to their role;

“ Where an order is made under section 3(1) of this Act, the Minister shall, by notice in the Gazette, appoint a public officer to be the adjudication officer for the adjudication area, and



the adjudication officer may in writing appoint such demarcation officers, survey officers and recording officers, being public officers, as may be necessary for demarcating, surveying and recording interests within the adjudication area, and they shall be subordinate to him.”

24. I have looked at the draft defence where even the applicant agrees that the suit land is registered hence under the jurisdiction of the Land Registrar. Accordingly, I am inclined to agree with the respondent that summoning the officer will not assist this Court in any way.
25. The upshot is that the application succeeds partially. The default judgment is set aside and the respondent is directed to file his statement of defence and comply with Order 11 of the Civil Procedure Rules within 14 days from the date of this ruling. Thereafter, the parties should fix a date for directions at the registry. Costs will abide the outcome of the case.

SIGNED AND DELIVERED AT NAROK VIA EMAIL ON THIS 6TH DAY OF JULY, 2022

C. MBOGO

JUDGE

6/7/2022

In the presence of:

CA: T.Chuma

