**Maiyo & another v Sitienei (Environment & Land Case 47 of 2018) [2022] KEELC 2707 (KLR) (13 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2707 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ENVIRONMENT & LAND CASE 47 OF 2018**

**FO NYAGAKA, J**

**JULY 13, 2022**

**BETWEEN**

**ELISHA KIPGETCH MAIYO ..... 1ST PLAINTIFF**

**JACOB KIPKURGAT MAIYO ..... 2ND PLAINTIFF**

**AND**

**JUDA CHEPSISOR SITIENEI ..... DEFENDANT**

**RULING**

1. The defendant's application dated October 28, 2021 was filed the said date. It was anchored on section 1A, 1B, 3 & 3A of the *Civil Procedure Act* as well as order 10 rule 11 of the *Civil Procedure Rules*. It sought the following:

   (1) spent;

   (2) spent;

   (3) That the orders of June 12, 2018 and April 15, 2021 be and are hereby lifted;

   (4) ...spent;

   (5) That the *ex parte* judgment entered on April 15, 2021 and all consequential orders be and are hereby set aside and the defendant be given unconditional leave to defend suit;

   (6) That the proposed draft defence/replying affidavit be deemed to have been properly filed and served subject to payment of the requisite court fees;

   (7) That costs of the application be provided for;

   (8) Any other or further relief that this honorable court shall deem just and expedient to grant.

2. The application was supported by the grounds on the face of the motion and further by affidavit of the defendant. The defendant contended that he was neither, personally or at all, served with summons to enter appearance nor the notice of entry of judgment. He produced and was marked as JCS 1, the return of service that he disputed. He maintained that the affidavit was marred with false dispositions. He also produced the request for judgment which he marked as JSC 2. His argument was that he became aware of the judgment when he attempted to conduct a search at the Lands Registry Trans-Nzoia county one (1) week prior to filing the present application. He stated that since he was not personally served, the judgment was irregular and was for setting aside. In addition, the defendant deposed that the originating summons did not disclose any reasonable cause of action as the plaintiffs were not in actual possession of the suit land that they claimed they acquired by way of adverse possession. He annexed his draft replying affidavit and marked it as JSC 3 laying grounds opposing the originating summons. He deposed that if stay was not granted, he stood to suffer irreparable harm. Finally, he deposed that it was in the interest of justice that the application be allowed as prayed.

**The Response**

3. In their replying affidavit filed on November 29, 2021 and sworn by the 1st plaintiff, it was deposed that service of summons was effected properly on May 5, 2018. Following that, a request for judgment was filed on June 11, 2018. He accused the defendant of filing the application with malice since it was only lodged when the defendant was served with a bill of costs for taxation. The replying affidavit further laid several grounds in support of the originating summons rebutting the defendant's draft replying affidavit. It was further deposed that the application had been overtaken by events as the decree had been executed. In the upshot, the plaintiff deposed that the application lacked merit. He urged this court to dismiss the same with costs.

**Examination Of Process Server**

4. Pursuant to prayer four (4) of the application, the process server, one George Mumali was called to testify on service. He was cross-examined on his return of service sworn on June 6, 2018. This took place on May 25, 2022. In summary, he recalled that upon receipt of an originating summons and accompanying documents from Messrs Bungei & Murgor Advocates, he effected service on the defendant on May 5, 2018. When he did so, he was accompanied by the 1st plaintiff. He proceeded to Ngonyek area along Kitale - Kachibora road to the homestead of the defendant. The 1st plaintiff and the defendant were immediate neighbours.

5. His testimony was that he arrived at the said homestead at 12:56 pm where he was received by the defendant's wife, one Selina Cheruto Sitienei. He was informed by the 1st plaintiff that she was the defendant's wife. He introduced himself and explained the purpose of his visit. Since the defendant was absent, she called him using her phone and he spoke with the process server and instructed him to leave the documents with the wife. She acknowledged receipt by retaining the defendant's copy on the promise that she would hand over the documents to him. She, however, did not sign on the process server's copy.

6. In explaining why he did not personally serve the defendant, the process server relied on order 5 of the *Civil Procedure Rules* which allows an agent to accept service on behalf of the party to be served. He stated that the defendant authorized his wife to accept service on his behalf. He produced his practice licence of the year 2018 to show that he had authority to effect service as a process server at the time, and it was annexed to the request for judgment. Later on, he served the defendant with a hearing notice and a notice to show cause.

**Submissions**

7. Save for the cross-examination of the process server, the application was disposed of by way of written submissions. According to the defendant, he was only aware of the suit at execution stage. He was not personally served with any pleadings or notices in this matter. He urged this court to exercise its discretion to allow this application to avoid a litigant from being shut out unheard. He submitted that the failure to respond to the originating summons was not his fault but that of the plaintiffs who failed to serve him. He maintained that his replying affidavit disclosed a reasonable defence. Additionally, he submitted that if the orders sought were granted, the plaintiff stood to suffer no prejudice. Finally, he stated that he only discovered that a suit had been filed when he conducted a search at the land registry. For this argument, he submitted that he had explained the delay in filing the present application.

8. On the part of the plaintiffs, it was submitted that the replying affidavit contained mere denials that disclosed no reasonable defence to justify the grant of setting aside orders. Since the defendant was properly served, the judgment was regular. They further submitted on the merits of the case maintaining that the court's judgment ought not to be disturbed as the suit was merited.

**Analysis And Disposition**

9. As a consequence of failure to enter defence, the procedure necessitates that judgment is entered in the favor of the plaintiff at an interlocutory stage. In light of this, the rules committee which drafted the *Civil Procedure Rules* formulated a remedy where a defendant is dissatisfied with such a judgment. Order 10 rule 11 of the *Civil Procedure Rules* becomes the armor of a party disgruntled by the interlocutory judgment. It provides that a court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

10. This discretionary power to set aside *ex parte* judgment in default was discussed in the Court of Appeal case of *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR, where Kneller JA observed as follows:

> "The former relevant order and rules were order IX rules 10 and 24. The court has no discretion where it appears there has been no proper service; Kanji Naran v Velji Ramji [1954] 21 EACA 20: and the power to set aside the judgment does not cease to apply because a decree has been extracted: Fort Hall Bakery Supply Company v Frederick Muigon Wargoe [1958] EA 118.
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> The court has a very wide discretion under the order and rule and there are limits and restrictions on the discretion of the judge except that if the judgment is varied it must be done on terms that are just: Patel v EA Cargo Handling Services Ltd [1974] EA 75, 76 BC.
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> This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice: Shah v Mbogo [1969] EA 116,123 BC Harris J.
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> The matter which should be considered, when an application is made, were set out by Harris J in Jesse Kimani v McConnel [1966] EA 547, 555 F which included, among other matters, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable to set aside or vary the judgment, upon terms to be imposed. This was approved by the former Court of Appeal

for East Africa in Mbogo v Shah [1968] EA 93, 95 F. There is also a decision of the late Sheridan J in the High Court of Uganda in Sebei District Administration v Gasyali [1968] EA 300,301,302 in which he adopted some wise words of Ainley J, as he then was, in the same court, in Jamnadas v Sodha v Gordandas Hemraj [1952] 7 ULR 7 namely: "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." And, because it is a discretionary power it should be exercised judicially, or in the Scots phrase, used by Lord Ainslie in Smith v Middleton [1972] SC 30: "... in a selective and discriminatory manner, not arbitrarily or idiosyncratically," for otherwise, as Lord Diplock said in his speech in Cookson v Knowles [1979] AC 556: "... the parties would become dependent on judicial whim ..." So the magistrate should have recalled these points. The respondent has a judgment which was not obtained by consent or as the consequence of a trial. The nature of the action is one that concerns land and who purchased it first and whether or not consent of the local land control board to the transaction was necessary and obtained by either of them and, altogether, it is not a trivial matter. A defence was before the court in time which was not dealt with at the trial. The respondent could have been compensated by costs for the delay occasioned by his advocate's dilatoriness and the appellant should not have been denied a hearing because of his advocate's mistake even if it amounted to negligence, in the circumstances of this case. Shabir Din v Ram Parkash Anand [1955] 22 EACA 48, 51 and Hancox J (as he then was) in Gurcharan Singh s/o Kesar Singh v Khudadad Khan t/ a Khudadad Construction Company Nairobi HCCC 1547 of 1969. The magistrate did not take these matters into consideration when he exercised his discretion. So the learned judge was entitled to interfere with the decision of the magistrate although it was a discretionary one. See Brandon LJ in The El Amria [1981] 2 Lloyd's Rep 539."

11. The objective behind setting aside judgment was articulated in the celebrated case of *Shah v Mbogo & Another* [1967] EA 116 where the court held thus:

> " I have carefully considered, in relation to the present Application, the principles governing the exercise of the court's discretion to set aside a judgment obtained ex-parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

12. In being guided as to the steps to take when an application such as the one now before me is presented, I am further guided by the case of *Patel v East Africa Cargo Handling Services Ltd* [1974] EA 75 that held:

> " 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 judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on 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."

13. Similarly, the Court of Appeal in *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & another* Civil Appeal No 6 of 2015 [2016] eKLR held:

> " From the outset, it cannot be gainsaid that a distinction has always existed between a 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 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 other. 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 v Nzioki [2004] 1 KLR 173).
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> 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".

14. From the authorities cited above, the court must first of all ascertain whether there is a regular judgment on record and secondly, if regular, whether the defence raises triable issues that necessitate that the matter be heard and determined on its merits. Flowing from the above, I will now proceed to determine the application as hereunder:

**Whether there is a regular judgment on record**

15. The gist of the application is that the defendant was never served with the summons to enter appearance. According to him, he only became aware of the suit when he sought to conduct a search on the suit property. He submitted that in those grounds, the judgment was irregular since he was never personally served.

16. The plaintiffs on the other hand maintained that the defendant was served properly. According to the return of service sworn by George Mumali, he effected service upon the defendant's wife after speaking to the defendant over the phone. The said process server was called to cross-examination on this affidavit.

17. I have scrutinized the court record. My observations are that after the suit was filed, the plaintiff instructed George Mumali, a licenced process server, to effect service upon the defendant on May 5, 2018. He was accompanied by the 1st plaintiff who was his neighbour. Further evidence revealed that the defendant was absent on the said date. They however found the defendant's wife at the homestead. The process server, who spoke to the defendant over the phone, explained his purpose of visit. The defendant instructed his wife to accept service of summons. The process server then prepared the return of service. Thereafter, the court on June 12, 2018 recorded that it was satisfied as to service

thereby prompting the endorsement of the request for judgment. It was on the strength of this affidavit that the suit proceeded for formal proof.

18. Looking at the return of service and the cross-examination of the process server, i am satisfied that the process server was clear, emphatic and truthful as to the manner of service, and that the service could therefore not be impugned. Although service was effected upon the defendant's wife, I am guided by the provisions enshrined in order 5 rule 8 of the *Civil Procedure Rules* which allows an agent to accept service on behalf of a party. I am satisfied that service of the agent, that is the defendant's wife, was sufficient. Consequently, I hold that the judgment entered was regular.

**Whether the defence raises triable issues**

19. As indicated from the decisions alluded to above, notwithstanding the fact of finding of that the judgment was regular, the main concern of the court is to do justice to the parties. This court is required to interrogate whether it is in the interest of justice that the regular judgment be set aside. Consequently, I must determine why, if at all, the defendant did not defend the matter, and whether I am satisfied that there is a defence on the merits. A defence on the merits is one that raises a triable issue that necessitates that the matter proceeds for trial on its merits.

20. On the first point, the court having found the judgment was regular, it behooved the defendant to have placed before this court sufficient material to explain why he did not defend the suit. It was not enough to inform the court that he was not served with the summons. He did not discharge that burden. Absence of the explanation would leave the court with no option but to not disturb the judgment. However, the court needs to examine one more issue: if the defendant has a defence on merits.

21. In the defendant's draft affidavit in reply to the originating summons it was deposed that the defendant is the registered proprietor of the suit land. He denied ever having sold the suit land to the plaintiffs' father as stated in the originating summons. In fact, he raises forgery claims on the agreements relied on by the plaintiffs. He stated that the plaintiffs sold the said parcel of land illegally. He further deposed that the plaintiffs had never been in occupation of the suit land. He denied that any loans were paid on behalf of the defendant as contended by the plaintiffs.

22. The above averments prompted the plaintiffs to respond to the draft affidavit. In their replying affidavit, the plaintiffs maintain that the defendants sold the suit land to the plaintiffs pursuant to the execution of two (2) sale agreements. Since the defendant had failed to transfer ownership, the plaintiffs demanded for the same. That this demand letter was written after a time lapse of twelve (12) years.

23. It is evident that the draft pleading instigated the plaintiffs' action to respond to the averments by way of rebuttals in its replying affidavit. It's clear beyond any form of peradventure that owing to the back and forth arguments in this application, the defence raises triable issues that can only be determined in a full hearing where parties present their evidence. The grounds in the draft affidavit call for the court's scrutiny that can only be available in a hearing and not at such an interlocutory stage. For these reasons, i find that the defendant has sufficiently demonstrated that there are triable issues that call for adjudication. Consequently, I hold that the defence is not a sham.

24. Before i give my final orders, i must express dissatisfaction with the period taken in filing the present application. While the defendant pitted that he filed the application instantaneously upon being aware of the suit, i am not convinced that he was aware of the suit at that juncture. However, I will give him the benefit of doubt. Be that as it may, the decisions in the Court of Appeal enunciated above herein tie me to not drive away a litigant from the seat of justice and let him be heard. The application was filed more than one (1) year after judgment was entered. The execution process has since commenced.

Since the said application will deny the plaintiffs the fruits of the judgement, and taking into account the steps taken in execution of the decree, i will award costs to the plaintiffs.

**Orders And Dispositions**

25. In light of the above, I make the following consequential orders:

(1) The *ex parte* judgment entered on April 15, 2021 and all consequential orders be and are hereby set aside only upon (or after) the defendant fulfilling the condition of him depositing in court the entire sum of taxed costs in the sum of Kshs 171,515/= within fourteen (14) days of this order.

(2) Further, the defendants shall pay the plaintiffs costs in the sum of Kshs 50,000/= within the next fourteen (14) days from the date of this order failing which the orders in (1) shall automatically lapse without any further reference to the court.

(3) The defendant shall file and serve the draft defence/replying affidavit within seven (7) days from (or after) the date of the payment of the sums as directed in (1) and (2 above (i.e. no fling before compliance with condition 1 and 2 above), failure of which the judgment shall revert irrespective of whether or not the sums have been paid.

(4) The matter shall be mentioned on July 28, 2022 to confirm compliance with the above orders and take further directions in terms of order 37 rule 19 of and order 11 of the *Civil Procedure Rules*.

Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 13TH DAY OF JULY, 2022.**

**DR.IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE.**