



REPUBLIC OF KENYA



Witu Nyongoro Ranch Company Limited v Dofoe & 32 others (Environment & Land Case 100 of 2016) [2022] KEELC 2341 (KLR) (6 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2341 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 100 OF 2016**

MAO ODENY, J

JULY 6, 2022

BETWEEN

WITU NYONGORO RANCH COMPANY LIMITED PLAINTIFF

AND

NAGEA DAMON DOFOE & 32 OTHERS DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 17th September 2021 by the defendant/applicants seeking the following orders:
 1. Spent.
 2. Spent.
 3. That an order do issue for the cross examination of the process server by the name Thomas Konde.
 4. That this Honourable Court be pleased to set aside the judgment delivered on 1 July 6, 2021.
 5. That the Applicants' defense be deemed to have been filed.
 6. That costs be borne by the Plaintiff.
2. The plaintiff filed a preliminary objection to the application on the ground that the Defendants application is fatally defective for failure to comply with Order 9 Rule 7 of the [Civil Procedure Rules, 2010](#).
3. Counsel agreed to canvas the application and the preliminary objection vide written submissions but only the plaintiff complied. The applicant's counsel did not file any submissions as agreed and as per directions of the court.



4. The application was supported by the affidavit by Karisa Raymond Ngumbao sworn on September 17, 2021 where he deponed that the defendants were never served with summons to enter appearance hence the affidavits of service were falsified. He urged the court to set aside judgment.
5. In response to the application, the Plaintiff filed a Replying Affidavit sworn on November 17, 2021 by Abdalla Jema Algi; and a Notice of Preliminary Objection dated November 22, 2021. Mr. Abdalla deponed that the Defendants were properly served with the Plaintiff and accompanying documents on May 12, 2016 as exhibited in the annexed affidavit of service of Thomas Konde sworn on May 15, 2016.
6. That the suit was fixed for formal proof on 7th October 2020 when proceeded after the Court was satisfied that the hearing notice dated July 28, 2020 was duly served on the Defendants as per the attached affidavit of service sworn on 11th September 2020 by Charles Syanda, a licensed court process server.
7. It was the plaintiff's case that the judgment and order were also served upon the Defendants on August 5, 2021 and that the defendants have not shown that they were never served as alleged. Further that the defendants' 'annexed draft defence does not raise any triable issues and urged the court to dismiss the application with costs

Plaintiff/respondent's Submissions

8. Counsel gave a brief background to the case and stated that the Plaintiff/Respondents are members and shareholders who have been in occupation of Land Reference Number 29274 (herein after referred to as the suit property) since the year 1960s when the suit property was unregistered which was later registered in the name of the Plaintiff Company and a certificate of title issued in the Plaintiff's name on September 20, 2012.
9. Counsel stated that the Defendants/Applicants illegally and unlawfully invaded the suit property and erected illegal structures therein of which the Plaintiff/Respondent reported the matter to the police station and the Defendants/Applicants were charged in court with the offence of trespass.
10. It was counsel's further submissions that the defendants were duly served with summons to enter appearance but neither entered appearance nor filed a defence within the stipulated time.
11. Counsel submitted on the preliminary objection and stated that since judgment had already been entered, the Defendants' advocates should have complied with Order 9 rule 7 of the Civil Procedure Rules by filing a notice of appointment prior to filing any other documents and relied on the case of *Reliance was placed on the case of K-Rep Bank Limited v Segment Distributors Limited* [2017] eKLR.
12. On the application to set aside judgment, counsel submitted that the defendants having been duly served, the judgment in this case is a regular judgement and the same cannot be set aside as a matter of right. Summons to enter appearance were properly served upon the Defendants/Applicants and Affidavit of Service sworn by Thomas Konde, a licenced processed server on 15th May 2016 and filed in Court.
13. Counsel relied on the cases of *K-Rep Bank Limited v Segment Distributors Limited* [2017] eKLR and *Fidelity Commercial Bank Limited v Owen Amos Ndung'u & another* HCCC No. 241 of 1998 UR, where he submitted that courts have emphasized on the distinction between a regular and irregular judgment.
14. Ms Thuku further submitted that this being a regular judgment the same cannot be set aside as a matter of right but at the discretion of the Court and relied on the case of *Shah v Mbogo & another* [1967] EA.



15. Counsel submitted on the principles governing the exercise of the court’s discretion where a party must have a reasonable explanation for delay; whether there is a defence on merit and whether it is just to set aside the judgment and stated that the defendant has not met the above threshold as no explanation has been given for the delay in entering appearance or filing a defence. Further, that the draft defence filed consisted of mere denials with no triable issues. Counsel cited the cases of *Amalo Company Limited v B.N Kotecha & Sons Limited & another* [2019] eKLR and *Ecobank Kenya Limited v Minolta Limited & 2 others* [2018] eKLR.
16. On whether it is just to set aside the impugned judgment, counsel submitted that the court’s discretion under Order 10 rule 11 is not meant to assist a party which deliberately omits or otherwise obstructs the course of justice as it was held in the cases of *Shah v Mbogo (supra)* and *Ecobank Kenya Limited v Minolta Limited & 2 others (supra)*.

Analysis And Determination

17. This is an application for setting aside an ex parte judgment and a preliminary objection The issues for determination are as follows
 - a) Whether the Defendants’ counsel is properly on record and whether the preliminary objection is merited.
 - b) Whether there was proper service of summons to enter appearance.
 - c) Whether the application for setting aside is merited.
18. The Notice of Preliminary Objection herein relates to the compliance of Order 9 Rule 7, of the *Civil Procedure Rules* which provides thus:

“Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.”

19. The firm of Oduor Henry John Advocates, filed the application dated September 17, 2021, but had not filed a Notice of Appointment of advocates. In the case of *Sitonik Ole Lotapash v Humbprey Mbugua Njache* [2020] eKLR the Court held as follows:

“19. I find that the Preliminary Objection to the effect that Counsel for the Applicant was not on record before filing his Application is not valid as the Applicant was not a party to the proceedings and had not previously acted on his own or through another Counsel to warrant his Counsel to file a Notice of Appointment before filing the Application. That notwithstanding, the Applicant’s Counsel had filed his Notice of Appointment on the January 9, 2010 before he filed the impugned Application. There is no requirement in law that stipulates that having previously not been involved in a suit, a party who wishes to file an Application therein must first file a Notice of Appointment.

20. Order 9 Rule 1 of Civil Procedure Rules does not require the filing of Notice of Appointment of an Advocate as filing of the said notice only applies where a party appoints an Advocate having previously acted in person or having sued or defended in person as clearly provided for under Order 9 Rule 7 of the *Civil Procedure Rules* which provides that:



Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications."

- 20 Similarly, the Defendants herein did not participate in the suit, therefore, Order 9 rule 7 is not applicable to them. There was no advocate on record who had been appointed to act for the defendants. The upshot is that the Plaintiff's preliminary objection is not merited.
21. On the issue of the application and whether there was proper service and whether the judgment should be set aside, the defendants claimed that they were never served and urged the court to call the Process server Thomas Konde come to Court and be cross examined on whether he effected service on them. Order 5 rule 16 of the Civil Procedure Rules provides that where it is alleged that the service of summons to enter appearance was improper, the court may call the process server for cross examination.
- 22 The Process Server Thomas Konde filed an affidavit of service dated 13th May 2016 by which gave an elaborate process on how he served the defendants by being taken around their houses by officers working with Nyongoro Conservations department and an employee of the Plaintiff Company. He gave a clear narration of how the service was done and how some of the defendants declined to acknowledge receipt.
23. I find that the process server gave detailed account and if any of the details given were inaccurate, the Defendants could have rebutted the same. Other than indicating that they were not served the Defendants have not pointed out what is untrue about the Affidavit of service.
24. The guiding provision of the Law with regards to setting aside of ex parte judgments is to be found in Order 12 Rule 7 of the Civil Procedure Rules which provides:-

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

Further Order 51 Rule 15 of the Civil Procedure Rules provides:-

The court may set aside an order made ex parte
25. The power to set aside *ex parte* orders are discretionary and the Court must use its discretion to come to a conclusion while also ensuring that justice has been done. The Court in Patel v E.A Cargo Handling Services Ltd [1974] EA 75, held that:-

“There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. 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 it by the Rules.”
26. Further in the case of John Mukuba Mburu v Charles Mwenga Mburu [2019] eKLR ,the Court held that: -

“It is trite that the test for the correct approach in an application to set aside a default judgment are; firstly, whether there was a defence on merit, secondly, whether there would be any prejudice and thirdly what is the explanation for the delay. This guide was set in the court of appeal case of Mohammed & another v Shoka [1990] 1KLR 463.”



27. The Defendants are seeking to set aside ex parte judgment on the basis that they were not served with the Summons to Enter Appearance. However, the Plaintiffs state that the Defendants were duly served. I have gone through the affidavit of service and find that there is indeed prima facie evidence that the Defendants were duly served.
28. It is strange that the defendants are only contesting service of summons and not the service of the hearing notices as exhibited in the subsequent affidavit of service by the Court Process Server, Charles Syanda. This can only mean one thing that the Defendants were all along aware of the suit but sought to ignore the same or wished away the suit. The Defendants' explanation is not plausible.
29. In the case of *Kenya Commercial Bank Limited v Nyatenge & another* [1990] KLR 443 where Bosire, J (as he then was) held that;
- “Order IXA Rule 10 of the Civil Procedure Rules donates a discretionary power to the court to set aside or vary an ex parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just. The discretion is a free one and is intended to be exercised to avoid injustice or hardship but not to assist a person of deliberate conduct intended to obstruct or delay the course of justice.”
30. The discretion of the court should not be used to assist a party who has not shown sufficient cause as to why the judgment should be set aside. The court is alive to the fact that every party is entitled to a hearing and that such party must not derail the administration of justice by failing to attend court and later make an application to set aside a judgment regularly duly entered. The court must exercise the discretion judiciously and not to assist a party who may deliberately delay or obstruct the course of justice I find that the defendants were duly served and only woke up when they realized that there were consequences for non-compliance with the requirements of responding to a claim.
31. On whether there is a Defence with triable issues, the case of *Patel v Cargo Handling Services* (supra) aptly explained a defence on merit as follows;
- “In this respect, defence on the merits does not mean in my view a defence that must succeed. It means as Sherridan J put it ‘triable issue.’”
32. Similarly in the case of *Tree Shade Motors Ltd. vs. D.T Dobie & another* (1995-1998) 1 EA 324 the court held that: -
- “Even if service of summons is valid, the judgment will be set aside if the defence raises triable issue. Where a draft defence was tendered with an application to set aside a default judgement, 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 exparte judgment aside.”
33. The applicants claim that they have a defence with triable issues. It is trite law that a defence need only raise a bona fide triable issue, which is 'any matter 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. See the case of *Olympic Escort International Co. Ltd. & 2 others v Parminder Singh Sandhu & another* [2009] eKLR.
34. The applicants annexed a draft defence which I have gone through and find that it has general denials and no triable issue has been raised to enable me set aside the judgment even after finding that service of



summons was proper and valid. Besides, the Defendants failed to file submissions despite this court's direction that the application be heard by way of written submissions.

35. I find that this is not a proper case to exercise my discretion in favour of the applicants and therefore the application is dismissed with costs to the plaintiff. The preliminary objection is also dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH 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.

