



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC CASE NO. 24 OF 2017 (CONSOLIDATED WITH MISC APPLICATION NO. E001 OF 2020)

HASSAN MOHAMMED HAJI.....PLAINTIFF

VERSUS

MOHAMMED KEYNAN HASSAN.....1ST DEFENDANT

SIYAT MUSA JIROW.....2ND DEFENDANT

BUDHUL KARABET.....3RD DEFENDANT

MOHAMMED HUSSEIN YUSUF.....4TH DEFENDANT

SIADH ALI RABETH.....5TH DEFENDANT

SIYAO ALI RABE.....6TH DEFENDANT

SADIK SHAFIN HASSAN.....7TH DEFENDANT

RULING

1. This Ruling relates to two applications. The first is dated 3rd November 2020 filed in ELC Miscellaneous Application No. E030 of 2020 Hassan Mohammed Haji versus Mohammed Keynan Hassan & 6 Others seeking the following Orders;

- a. That the Honourable Court be pleased to issue and Order eviction of the Respondents from the parcel of land known as Land Reference Number 28560 and the demolition of all unauthorized structures thereon.
- b. That the officer commanding station of the Garissa Town Police station be ordered to provide security during the eviction of the Respondents.
- c. That the Respondents do pay costs of the application.
- d. That the Respondents be ordered to pay all such costs and expenses as are incidental to the enforcement and execution of the eviction Order.

2. The application was based on the grounds apparent on the face of the application and the supporting affidavit of **Hassan Mohammed Haji** who averred that he is the registered owner of Land Reference No. 26850 located in Garissa. (Herein referred to as the suit property). That he obtained judgement against the Respondents jointly in Elc No. 24 of 2017 wherein the Respondents were ordered *inter alia* to vacate the suit property and pay damages for trespass. That despite notice of the said judgement the Respondents failed and/or refused to vacate the suit property.

3. That upon expiry of the six (6) months' period he proceeded to issue an eviction notice pursuant to *Section 152E of the Land Act 2012* which was published in both the Daily nation and standard newspaper on 26th June 2020. The copies of the eviction Order were displayed on at least five strategic places within the suit property but were quickly torn down by the occupants.

4. That the eviction was to take place on 23rd September 2020. However the Respondents have refused to vacate. That the Respondents have not raised an objection order nor appealed the judgement in ELC 24 of 2017. That the copies of the eviction notice were served on the

Deputy County Commissioner as well as the Officer Commanding Station Garissa Town Police station.

5. The Application was opposed by **Sadik Shafin Hassan the 7th Respondent in ELC Misc. E001 of 2020**. He averred that he was represented by J.O. Otieno, advocate, and that he only learnt on the material date that he did not have a valid practicing certificate and as such the court ordered that the Respondents be served in person.

6. That the applicant did not make sufficient effort to serve him with court pleadings and documents in Elc No. 24 of 2017. That he misled the court and was granted leave to serve vide substituted service. That he did not have access to newspapers when the service was effected by way of advertisement in the local dailies and therefore did not see the hearing notices advertised.

7. That he has always maintained that he was sued in his personal capacity yet the disputed land belongs to a registered self-help group christened Maramtu II farm which has taken steps to be included in the suit.

8. The second application is dated **26th November 2020, filed in ELC Case No. 24 of 2017** by **Abdi Bille Maalim** the current chairperson of Maramtu II Farm. The application seeks the following Orders;

a. Spent.

b. Spent.

c. That the Honourable Court be pleased to set aside the judgement issued on 25th March 2019 and the decree issued on 15th April 2019.

d. That the Honourable Court be pleased to Order that the suit be heard de novo.

e. That the Honourable Court be pleased to Order that Maramtu farm II be added as Defendants in this suit.

f. That costs of this cause do abide the cause.

g. That the Honourable Court be pleased to make any other Orders as it deems fit and just.

9. The application was supported by the grounds shown on the face of it and the supporting affidavit of **Abdi Bille Maalim** who averred that Maramtu II is a registered self-help group registered with the then Ministry of Gender, Children & Social Department.

10. That Maramtu II farm has been in existence since 1976 and carries on agricultural activities as a means of livelihood. That Maramtu Farm II is the proprietor of all parcel of land allocated by the defunct County Council of Garissa vide minute dated 20th February 1979.

11. That Sadik Shafin Hassan, a former chairperson of the group and 6 Others were used in their individual capacities but the plaintiff did not take any steps to inform the farm of the suit and as such were condemned unheard. That the substituted service through advertisement was directed against individuals and as such Maramtu II Farm was not notified by the advertisement. That unless the Honourable Court sets aside the judgement, Maramtu II Farm members face being evicted without having being heard.

12. The Plaintiff/Respondent opposed the application dated 26th November 2020 vide grounds of opposition dated 12th July 2021 on the following reasons:-

a. That the application is incompetent, misconceived and an abuse of the Court process.

b. The application has not established sufficient cause to warrant the setting aside of the judgement.

c. The delay in filing the application for review is so inordinate as to warrant its immediate dismissal with costs.

d. Given that this suit has been in court since 2012, the plaintiff will be prejudiced if the Orders sought in the application are granted.

e. That the application is baseless and merely intended to delay the execution of the judgement entered in favour of the plaintiff thereby continuing to deny the plaintiff the quiet use and enjoyment of the suit property.

13. On 29th July 2021 this Honourable Court issued the following directions;

a. That the suit is hereby consolidated with Misc. Application E001 of 2020.

b. That the Notice of Motion dated 26th November 2020 be heard simultaneously with the notice of motion dated 3rd November 2020.

c. That the two applications be canvassed by written submissions.

d. That the applicant in ELC No. 24/2017 be the first to file and serve their submissions within 21 days from today.

e. That the applicant in Misc No. E001 of 2020 to file and serve their submissions within 21 days after service by the Respondent.

14. The plaintiff submitted that the Supporting affidavit sworn by Abdi Bille Maalim offends the provisions of **Order 9 Rules 1 (a) and 2 (a) of the Civil Procedure Rules 2010** for the reason that the deponent lacks capacity and/or authority to swear the same on behalf of the applicants thereby rendering the application defective. That the applicant had not sought the consent of the Defendants for them to be added as defendants in the suit. The defendants have not also shown support for this prayer. He cited the case of **Pamela Jebichii Koskei Vs Horizon Coach Co. Ltd & 2 others [2018] e K.L.R.**

15. On whether there is sufficient cause to warrant the setting aside of the judgement, the plaintiff submitted that service to the Defendant was effected lawfully pursuant to a Court Order allowing for substituted service. There is no suggestion that the service was irregular. That the defendants had entered appearance and filed their respective defenses, witness statements and supporting documents. In paragraph 8 & 9 of the judgement, the court confirmed the same. That it is therefore clear that the defendants elected not to defend the suit.

16. The plaintiff also took issue with the inordinate delay that the Respondents took to file the application given that they knew of the same from 25th April 2020. In this regard he cited the case of **William Macharia Maina & Another Vs Francis Barchuo & 3 Others Kibiwott Yator Kuryases & 8 others (Interested parties) e K.L.R.**

17. On whether the application in Misc E01 of 2020 has merit, the plaintiff submitted that he issued the prerequisite notices under *Section 152 of the land Act*. That the Respondents are guilty of abandoning their defence hence the principle "**Justice should not aid the indolent**" should apply in this case. That the plaintiff had no obligation to serve the Maramtu II Farm since it was not a party to the main suit.

Analysis and Determination

18. From the two applications, the supporting affidavits, grounds of opposition and the submissions filed, I find that the following are the issues for determination:-

- a. Whether the judgement of this Honourable Court dated 25th March 2019 and all consequential orders should be set aside?
- b. Whether leave ought to be granted to the Applicants i.e. Maramtu Farm II to be added as defendants in this suit.
- c. Whether the suit herein ought to start *de novo*.
- d. If a, b, c is in the negative, whether eviction Orders ought to issue against the Respondents in Misc E001 of 2020.

19. This case has a long chequered history. It commenced on 12th June 2012 in *Hassan Mohammed Haji versus Burdhul Kabarnet Yarrow & 4 Others* (now the 3rd to 7th Respondents in E001 of 2021). The defendants filed their defence on 10th May 2013.

20. The file was transferred to Meru through a Ruling dated 26/5/2015 where it was consolidated with Kerugoya ELC Case No. 4 of 2014 Hassan Mohammed Haji versus Mohammed Keynan Hassan & Anor, the lead file now being Meru ELC Case No. 15 of 2014 Hassan Mohammed Haji Versus Mohammed Keynan & 6 Others (the parties herein).

21. On 14th May 2018 the Court in Meru issued Orders which granted leave to the 3rd to 7th Defendants to be served via substituted service either through the Standard or Daily Nation Newspaper, two weeks prior to the Hearing date.

22. The suit was later transferred to this Honourable Court and now bore the Case No. ELC No. 24 of 2017 Hassan Mohammed Haji Versus Mohammed Keynan & 6 Others (the parties herein). The matter proceeded for hearing on 18th November 2018, after the Court was satisfied that service had been effected through advertisement. During the hearing, only the plaintiff testified and judgment was entered against the defendants as follows;

- a. The Defendant is given six (6) months' notice to vacate the plaintiff's land parcel No. 28650 situated in Garissa failure of which an eviction Order to issue.
- b. The Defendants to pay the plaintiff nominal damages for trespass in the sum of Kshs. 100,000/= plus interest at Court rates from the date of delivery of the judgement.
- c. The defendant to bear the costs of the suit jointly and severally.

23. During the Commencement of the suit and in Reply to an application filed by the plaintiff, Sadik Shafin Hassan, the defendant replied stating that they exclusively own the property. He attached the following documents; *list of Maramtu II Farm Group Members, meeting of Maramtu II Farm Group dated 18th November 2010, Regulations and Rules of Maramtu II Farm Group, Meeting of Council held on 20/2/1979, receipts, letter from Garissa County Council on ownership of farm 133, Division of Maramtu Farm II, Certificate of registration, certificate of recognition from Food and Agriculture Organization, certificate for presidential farmer's competition.*

24. The defendants also filed a defence and similarly filed witness statement and list of documents dated 8th June 2015 citing the above mentioned documents. This was confirmed in the Court's judgment at paragraph 9 where it stated:-

“Additionally, the Defendants through the firm of J.O. Otieno & Co. Advocate filed a witness statement sworn by the 5th Defendant and a list of documents they sought to rely on and a list of witnesses, however it is notable that none of the said documents sought to be relied on was filed in court.”

25. Having carefully gone through the relevant history and summarized the facts of the case, I now delve to go into the issues raised in the two applications.

26. The first issue is whether the judgement ought to be set aside. Order 12 Rule 7 of the Civil Procedure Rules provides that;

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

27. In the Court of Appeal *C.A No. 6 of 2015 James Kanyita Nderitu Vs Maries Philotas Ghika & Another [2016] e KLR* 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 issues 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 Vs 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 Vs 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 be precluded from participating in them.”

28. In this case, the defendants were served with summons to enter appearance, the plaint and all other documents of claim. The defendant instructed the firm of Advocates practicing in the name and style of J.O. Otieno & Co. Advocates who filed a Notice of appointment and defence.

29. The plaintiff’s counsel could not trace the offices of J.O. Otieno & Co. Advocates stating that their offices had been closed. That forced this Court to ask the learned counsels to find out from the Law Society of Kenya whether the firm of J.O. Otieno were still in practice. The Law Society of Kenya wrote back stating that the sole proprietor of the said firm of J.O. Otieno & Co. Advocates had not taken a practicing certificate for the year under review.

30. By an application dated 11/5/2018 and filed in Court on 14/5/2018, this Honourable Court allowed the plaintiff to effect service of Court processes upon the defendants by way of substituted source, to wit; vide the Standard Newspapers or the Daily Newspapers.

31. The case was thereafter fixed for hearing on 9th July 2018 but could not proceed and the same was again fixed for hearing on 18/12/2018 where the case proceeded after the Court was satisfied that the defendants were duly served through substituted service as directed by the Court.

32. According to the defendants/proposed defendants, they were not aware of the suit and therefore they could not have seen the newspaper advertisement of the suit hearing date and judgment.

The defendants/interested parties also contend that they are illiterate and have no access to newspapers and therefore could not reasonably see the advertisement.

33. It is on record that this Honourable Court granted leave to the plaintiff to serve Court processes upon the defendants in this suit through substituted service. When this suit came up for hearing on 18/12/2018, the Court allowed the matter to proceed *ex-parte* after it was satisfied that the defendants had been duly served through the approved mode of service.

34. It therefore follows that the defendants were properly served with the hearing notice. I see nothing wrong with the mode of source used especially after this court was satisfied that the advocate who was instructed by the defendants was not authorized to practice after he failed to take out a practicing certificate for the year under Review.

35. A Court has discretion to order service through advertisement and once a party complies with the directions of the Court, the defendant must be deemed to have been served.

36. It is a strong presumption that once an advertisement is placed, the person is duly served. The question whether the recipient is literate or illiterate does not arise.

In a similar case of *Anjeli Limited Vs Kenga Simba & 12 others; Chengo Omar & 19 others (Intended interested parties) (2021) e K.L.R, Munyalo J.* observed as follows:-

“21. The record shows that on 4th October 2017, Komingoi J. made an order that the defendants be served with summons through an advertisement in the Daily Nation or Standard Newspaper. I mentioned at the beginning of this ruling that the advertisement was duly placed in the Daily Newspaper of 15 January 2018. It follows that the defendants were properly served with summons to enter appearance. I see nothing wrong with this mode of service. A Court has discretion to order service through advertisement, and once a party complies with the directions of the Court, the defendants must be deemed to have been served. To hold the contrary would be absurd. There is a presumption that once an advertisement is placed, then the person is duly served, and the law does not question the recipients level of literacy. In any event, I have gone through the affidavit of Mr. Katana. He says that “majority of us are illiterate”. He certainly does not state that all of the parties are illiterate. It follows that they could read the advertisement, and if they did not enter appearance, they can only have themselves to blame”.

I fully agree with the reasoning and persuasion in the said decision.

37. This Court was satisfied that the defendants were duly served and directed the hearing of the suit to proceed after the defendant and/or their advocate on record failed to attend Court. The defendants cannot now cry foul that they are illiterate.

38. The defendant and or interested parties also sought to have the judgment of this Court entered on 25th March 2019 set aside together with all consequential orders and the suit be heard denovo.

39. Following my finding that service of the hearing notice upon the defendants was proper and that the judgment issued on 25th March 2019 and the decree thereof was regular, I find no proper reasons to grant the orders for setting aside sought by the defendants/proposed interested parties.

40. Though a Court has wide discretion to set aside an ex-parte judgment, that discretion can only be exercised judicially. The principles for setting aside of an ex-parte judgment was considered in the case of *Patel Vs East Africa Cargo Handling Services Ltd (1973) E.A. 75* where William Duffus stated:-

“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 judgment as is the case here, the Court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheritan, J. put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication”.

41. I agree with that dictum in principle. Even if I were to consider the defence which is on record, I find no useful purpose as the defence filed does not challenge the plaintiff’s certificate of title which is a prima facie evidence of ownership of property.

Section 26 of the Land Registration Act No. 3 of 2012 provides as follows:-

“26 (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge, except:-

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

42. The defence filed by the defendants in this suit is not challenging the certificate of ownership issued to the plaintiff as the proprietor of the suit land. I therefore find it absurd to set aside the regular judgment entered in favour of the plaintiff herein.

CONCLUSION

43. In view of all the reasons given above, I hereby issue the following orders:-

- 1. The Notice of Motion by the defendants dated 26th November 2020 is dismissed with costs.**

2. The Notice of Motion by the plaintiff dated 3rd November 2020 is allowed with costs.

RULING DELIVERED VIRTUALLY AT KERUGOYA THIS 5TH DAY OF NOVEMBER, 2021

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Karumba for Plaintiff
2. Defendant/Advocate – absent
3. Kabuta – Court clerk.