



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 43 OF 2016

BERNARD MBOLE KAVOO.....1ST PLAINTIFF/RESPONDENT

MUTUNGA MUSYOKI.....2ND PLAINTIFF/RESPONDENT

DAVID MUTUKU NZAU.....3RD PLAINTIFF/RESPONDENT

VERSUS

LUKENYA RANCHING AND FARMING

CO-OPERATIVE SOCIETY LIMITED.....1ST DEFENDANT/APPLICANT

JOHN KIMANI MWEGA.....2ND DEFENDANT/APPLICANT

MACHAKOS DISTRICT LAND REGISTRAR.....3RD DEFENDANT/APPLICANT

JOSIAH MAKAU NZIOKA.....4TH DEFENDANT/APPLICANT

RULING

1. By a Notice of Motion dated 28th September, 2020 filed under a Certificate of Urgency, the Defendants/Applicants seek the following orders:

a. Spent.

b. That pending the inter partes hearing and determination of this Application herein the Decree Holder/Respondents their agents, servants, employees be restrained, in any manner howsoever from, further development, transferring, selling, conveying, charging, leasing or in any way dealing with land reference number Mavoko 3/3342 (referred herein as the suit property).

c. That this Honourable Court be pleased to set aside the Judgment herein entered on 16th November, 2018, the Decree dated 5th December, 2018 and all the consequential orders herein.

d. That costs of this Application be provided for.

2. The Application was supported by the Affidavit of the 2nd Applicant. The 1st Respondent filed a Replying Affidavit sworn by him on 23rd April, 2021 in response to the Application. The Applicants and the Respondents have canvassed the Application by way of written submissions.

3. The 2nd Applicant deponed that the 1st Respondent had seen him on the suit property planting trees and fencing the land but did not notify him of this suit; that he became aware of the suit on 19th September, 2020 despite the Respondents alleging that the pleadings and summons to enter appearance were served on the Defendants by way of advertisement in the newspaper and that he did not Appeal since no notice of Judgment was served upon him.

4. Based on the advice of his advocate, the 2nd Applicant deponed that service by advertisement in the newspaper was unprocedural since no

attempt of service upon the Applicants was shown or reasons of the inability was adduced by the Respondents vide an Affidavit of Service sworn by a process-server.

5. The 2nd Applicant deponed that the Respondents misled the court that service of summons had been served hence the suit proceeded for hearing *ex parte*; that the draft Defence attached on his Affidavit and marked as JKM-4 raises triable issues and that he is apprehensive that the Respondents will dispose off part of the suit property now that there is a court decree in place.

6. In response to the Application, the 1st Respondent deponed that the service of summons via the Daily Nation newspaper advertisement dated 28th September, 2016 was proper, regular and with the leave of the court; that his advocates attempted to serve summons in person upon the Applicants and that since the Applicants whereabouts and addresses were unknown, the service by substituted service via newspaper was sought and granted by the court.

7. According to the 1st Respondent, the Daily Nation newspaper is wide in circulation; that it is just to assume that the Applicants knew or ought to have known about the existence of this suit against them and that no Affidavit of Service was required in the circumstances under Order 5 Rule 17 of the Civil Procedure Rules, 2010.

8. According to the 1st Respondent, the court became *functus officio* after delivering the Judgment on 16th November, 2018; that the injunction sought by the Applicants amounts to reopening of the case and that under Order 22 Rule 6 of the Civil Procedure Rules, 2010 there is no requirement to serve notice of entry of default Judgment since the Respondents were not seeking execution by payment, attachment or eviction. The 1st Respondent deponed that the Judgment herein was regular.

9. The 1st Respondent finally deponed that there is inordinate delay of one (1) year and ten (10) months to file the Application and that the Defence and Counter-claim does not raise triable issues.

Submissions:

10. The Defendants/Applicants submitted that the Judgment herein is irregular and that their Defence raises triable issues. On the principles to be relied on to set aside Judgment, the Applicants placed reliance on the case of ***Wachira Karani vs. Bildad Wachira (2016) eKLR***.

11. The Applicants submitted that the Respondents did not demonstrate the attempts they made to serve the summons to enter appearance neither did they file an Affidavit of Service hence the Application dated 4th July, 2016 ought not to have been allowed.

12. According to the Applicants, their Defence and Counter-claim raises *bona fide* triable issues and that in any event, the Judgment was irregular. Reliance was placed on the case of ***James Kanyiita vs. Maros Philites (2016) eKLR*** and ***Elizabeth Kavere vs. Lilian & Another (2020) eKLR***.

13. The Applicants submitted that Order 5 Rule 17 of the 2010 rules was not complied with since no Affidavit of Service by a process-server was filed showing the attempted and failed service. Reliance was placed on the case of ***Kaniki vs. John Njiru Njuki & Others (2014) eKLR***. According to the Applicants, the Affidavit of Service sworn by the 1st Respondent did not meet the evidential threshold required before substituted service can be allowed hence the Judgment herein should be set aside *ex debito justitiae*.

14. The Applicants submitted that their Defence and Counter-claim raises several triable issues. Reliance was placed on the case of ***Kenya Commercial Bank vs. Suntra Investment Bank Ltd [2015] eKLR***, ***Saudi Arabia Airlines Corporation vs. Premium Company Ltd*** and ***Isaac Awuondo vs. Surgipham Ltd & Anor (2011) eKLR***. It is urged by the Applicants that cases should be determined on merits without undue regards to technicalities. Reliance was placed on the case of ***Wenendeya vs. Gaboi [2002] 2EA 662***.

15. The Respondents submitted that the court became *functus officio* upon delivery of its Judgment on 16th November, 2018. According to the Respondents, the proper avenue would be for the Applicants to seek stay of execution before the Court of Appeal. Reliance has been placed on the case of ***Telkom Kenya Ltd vs. John Ochanda [2014] eKLR***. Counsel submitted that the only exceptions available to the doctrine of *functus officio* are provided for under Order 21 Rule 3(3) of the Civil Procedure Rules, 2010 and Section 99 of the Civil Procedure Act and that an injunction is not one of the grounds envisaged in Section 99.

16. According to the Respondents, an order for injunction would require that there is a *prima facie* case and that the court would be required to reconsider its own evidence on record which would amount to this court sitting as the appellate court.

17. The Respondents submitted that the Judgment was regular since service of summons to enter appearance was effected with the leave of the court via a newspaper advertisement. According to the Respondents, the Defence and Counter-claim do not raise triable issues as the Applicants have not explained how the 4th Applicant became a member of the 1st Applicant either by a shareholder's register or through an original allotment letter.

18. It is urged by the Respondents that the Applicants have not shown sufficient cause for failing to file appearance or Defence. The Respondents submitted that the Applicants are indolent hence the discretion should not be exercised by the court in their favour.

19. I have read and considered the Application, the rival Affidavits as well as the submissions filed by the respective parties. The issue for consideration and determination is *whether there is sufficient evidence to warrant setting aside the Judgment entered against the Applicants on 16th November, 2018, the Decree dated 5th December, 2018 and all the consequential orders.*

20. Setting aside of the Judgment is discretionary. The discretion is couched under *Order 12 Rule 7 of the Civil Procedure Rules 2010* as follows:

“Setting aside Judgment or dismissal.

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.”

21. It is trite that the court has unfettered discretion to either allow or refuse to set aside the order of dismissal, which discretion is to be exercised on principles. In the case of ***Shah vs. Mbogo (1967) EA 116***, it was held that discretion should be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but not to assist a party who has deliberately sought to obstruct or delay the course of justice.

22. In the case of ***Patel vs. E.A. Cargo Handling Services Ltd (1974) EA 75***, the court held as follows:

“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.”

23. In the case of ***James Kanyiita Nderitu & Another [2016] eKLR***, the Court of Appeal stated as follows:

“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 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 default Judgment, and will take into account such factors as the reason for 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 and whether on the whole it is in the interest of justice to set aside the default Judgment, among others.”

24. In ***Richard Murigu Wamai vs. Attorney General & Another [2018] eKLR***, while quoting the case of ***Patel (supra)*** the Court observed that:

“That where there 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 a Defence that must succeed. It means a ‘triable issue’ that is an issue which raises a prima facie Defence which should go to trial for adjudication.”

25. Further, in the case of ***Salaba Agencies Ltd & Michael Riorio [2015] eKLR***, the Court stated as follows:

“What then is a Defence that raises no bona fide triable issue. 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.”

26. This suit was commenced by way of a Plaint dated 27th January, 2017. In the Plaint, the Plaintiffs averred that parcel of land known as Mavoko Town Block 3/3342 (*the suit property*) was originally registered in favour of the 1st Defendant and that by virtue of the 2nd Plaintiff being a shareholder in the 1st Defendant’s Society, he was allocated 20 acres of the said land.

27. The Plaintiffs’ case is that the 2nd and 4th Defendants were eventually registered as the proprietors of the suit property fraudulently. The Plaintiffs sought for the cancellation of the Title Deed that was issued in favour of the 2nd Defendant in respect to the suit property.

28. The record shows that vide an Application dated 4th July, 2016, the Plaintiffs sought for the leave of the court to serve the Defendants with the summons through the Daily Nation newspaper. In the Affidavit Supporting the said Application, the 1st Plaintiff deponed that his advocates have been unable to serve the rest of the Defendants apart from the Machakos District Land Registrar and that they should be served by way of advertisement. The Application was heard by the Deputy Registrar of this Court who allowed it on 19th September, 2016.

29. Order 5 Rule 15 of the Civil Procedure Rules provides as follows:

“15. Affidavit of Service [Order 5, Rule 15.]

(1) 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 the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The Affidavit of Service shall be in form No. 4 of Appendix A with such

variations as circumstances may require.”

30. Order 5, Rule 17 of the Civil Procedure Rules provides the manner in which substituted service is to be effected as follows:

“(1) where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this order, the court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house, if any, in which the Defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.”

31. Before the court grants leave to a party to serve court process by way of substituted service, it must be satisfied by way of Affidavit evidence that the summons cannot be served in accordance with the provisions of Order 5 of the Civil Procedure Rules. I have gone through the records and I have not come across an Affidavit of Service (or an Affidavit of non-service) either by the Plaintiffs' advocate or the process-server to show the efforts that were made to trace the Defendants for the purpose of serving them.

32. Indeed, in the Affidavit in support of the Application dated 4th July, 2016, there was no mention of the fact that efforts had been made to trace the Defendants without success. All that the 1st Plaintiff stated in his Affidavit was that *“am reliably informed by my advocates that they have not been able to serve the rest Of the Defendants/Respondents apart from Machakos District Registrar.”* That being the case, the Deputy Registrar of this court should not have allowed the Plaintiffs' Application for substituted service.

33. I have perused the draft Defence and Counter-claim by the 2nd Defendant. in the Defence, the 2nd Defendant has alleged that he purchased the suit property from the 4th Defendant and that the said 4th Defendant was a member of the 1st Defendant. The 2nd Defendant has averred that he has a Sale Agreement; that after purchasing the suit property, he was issued with a Title Deed and that he has also planted trees on the land.

34. That being the case, it is my finding that the 2nd Defendant's Defence and Counter-claim raises triable issues which should be heard and determined on merits. Considering that it is possible that the 2nd Defendant did not see or read the advertisement in the Daily newspaper and the draft Defence and Counter-claim having raised triable issues, I shall exercise my discretion in favour of the 2nd Defendant.

35. For those reasons, I allow the 2nd Defendant's Application dated 28th September, 2020 as follows:

a) The Judgment of this court dated 16th November, 2018 is hereby set aside.

b) The 2nd and 4th Defendants to file their Defence and Counter-claim within fourteen (14) days of the date of this Ruling.

c) Each party to bear his/its own costs.

DATED, SIGNED AND DELIVERED IN MACHAKOS VIRTUALLY THIS 25TH JUNE, 2021.

O. A. ANGOTE

JUDGE