



Beshai Tropical Gardens Limited v Nyangori & 2 others (Environment & Land Case 130 of 2016) [2025] KEELC 3982 (KLR) (15 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3982 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 130 OF 2016
CA OCHIENG, J
MAY 15, 2025**

BETWEEN

BESHAI TROPICAL GARDENS LIMITED PLAINTIFF

AND

ROBERT NYANGORI 1ST DEFENDANT

CAVINE OMBOGO 2ND DEFENDANT

SAOME MUREITHI 3RD DEFENDANT

RULING

1. Judgment was entered for the Plaintiff in this matter on 2nd March 2023. The suit was undefended by the Defendants against whom eviction orders were issued. Subsequently, the Defendants filed the Notice of Motion application dated the 29th January 2025 which is for determination. They seek the following Orders:
 - a. Spent.
 - b. That the Honourable court be pleased to set aside the judgment entered into on 2nd March 2023.
 - c. Spent.
 - d. That the Defendants/Applicants be granted leave to file their defence and defend the suit.
 - e. That costs of this application be provided for.
 - f. Any other order that this Honourable court deems fit to grant.
2. The application is premised on grounds on its face and on the 1st Defendant's supporting affidavit as well as his further affidavit. He avers that on 27th January 2025, an eviction order dated the 20th March



2024 was served by being left at a shop located on the suit land. He contends that the suit land is unsurveyed and unregistered. Further, that it forms part of electricity and fire hydrant wayleave and is located at Rabai Road in Buruburu. He claims subsequent instructions to their advocate revealed the entry of a default Judgment in this matter on 2nd March 2023 and a Decree issued on 5th April 2023, which they had no prior knowledge of. He deposes that their advocate informed them that they were served by way of a newspaper advertisement yet they have been in possession and occupation of the suit land since 1995.

3. He avers that the suit land cannot be allocated to an individual or registered to an individual for development as purported by the Plaintiff, thus its purported purchase is an illegality. He contends that if the Judgement herein is not set aside, the Defendants will be condemned unheard, which is against the rules of natural justice yet their proposed draft defence raises triable issues and there are many families that rely on the suit land where they have put up small businesses and kiosks. He reiterates that the Plaintiff will not be prejudiced.
4. In his further affidavit, the 1st Defendant informs the court that the Defendants were evicted from the suit land on 26th February 2025 by ICON auctioneers accompanied by officers from Buruburu Police Station who purported to give vacant possession to the Plaintiff, who in turn hurriedly took possession by fencing it off with iron sheets and started to deliver building materials including stones thereon.
5. He contends that the Nairobi City County got wind of the eviction and despite the orders issued herein, it forcefully evicted the Plaintiff terming its purported occupation an attempt to grab public land meant for wayleave and water hydrant. He claims that members of the public joined in reclaiming the suit land and the incident was widely covered by local and international media.
6. He argues that the action by Nairobi City County of evicting the Plaintiff is justified. Further, that the Plaintiff does not have any right of ownership of the suit land as it purports to do and it does not have ownership documents. Further, that courts should not be used to rubber stamp illegalities.
7. The application is opposed by the Plaintiff vide the replying and supplementary affidavits sworn by Ms. Salome Gakenia Kabando, one of its directors. She asserts that proper service by substituted service was effected upon the Defendants pursuant to this Court's orders of 26th May 2021 as personal service upon them had proved impossible. She insists that the instant application is frivolous as the Defendants have no *prima facie* case as the suit land, Plot No A Rabai Road was allocated to the Plaintiff vide the Letter of Allotment dated the 3rd May 1996 issued by Nairobi City County. She contends that the annexed draft defence does not raise any triable issues as there is no proof of the allegation that the land is a wayleave/illegally acquired land as alleged and there is no proof of ownership by the Defendants.
8. She deposes that the Plaintiff stands to suffer prejudice should the application be allowed including allowing illegal occupation on legally acquired land. Further, that she had incurred costs in defending this application. She admits that this court's orders of eviction were implemented on 26th February 2025 and that the Plaintiff took possession of the suit land. She denies that the Plaintiff was evicted by Nairobi City County and annexed copies of the Plaintiff's ownership documents which include Copy of Letter of Allotment dated 3rd May, 1996, Beacon Certificate, Sale Agreement and Receipts for paying rates among others.
9. The application was canvassed by way of written submissions.

Submissions

10. In their submissions, the Defendants contend that while they were allegedly served vide a newspaper advertisement, they did not see it and that it is possible not to see it considering that not everyone



in Kenya reads newspapers daily. They submit that Article 50 of the Constitution guarantees fair hearing, which is a cardinal principle of natural justice without which, the rule of law would be without equilibrium. They urge the court not to condemn them unheard. The Defendants also submit that the case brings forth triable issues that need to be properly interrogated before a final determination is taken. The Defendants further submit that after evicting the Plaintiff, Nairobi City County surrendered back the suit land to them and that they are in temporary occupation. To buttress their averments, they relied on the following decisions: Philip Mutiso Mulalya v Samuel Dominic Muathe & 2 Others [2022] eKLR; Patel v EA Cargo Handling Services Ltd [1974] EA 75 and CMC Holdings Limited v James Mumo Nzioki [2004] eKLR.

11. The Plaintiff in its submissions insists that the instant application has been overtaken by events to the extent that eviction already took place on 26th February, 2025. It argues that the Defendants admitted that the Plaintiff served them. It contends that a regular judgement can only be set aside for a just cause. It avers that there is no iota of evidence to show that the Defendants were allocated the suit land. Further, that they have even distanced themselves from ownership and claim that the suit land is public utility land. They argue that only the County Government of Nairobi and the National Land Commission have the locus standi to defend public land. It emphasizes that there is no *prima facie* defence to warrant setting aside of this court's judgment. It further submitted that the Court should disregard the submission by the Defendants that the suit land was surrendered back to the Defendants since it is evidence from the bar, not contained in any affidavit. To support its arguments, it relied on the following decisions: Gulf Fabricators v County Government of Siaya [2020] eKLR; Nzangu & 3 Others v Shukrani Limited & Another (Environment & Land Case 77 of 2016 & Environment and Land Miscellaneous Application 49 of 2016 (Consolidated) [2022] KEELC 4742 (KLR) (31 August 2022) (Ruling) and Kenya Women Finance Trust v Raphael Okeyo Sangra & Another (2021) eKLR.

Analysis and Determination

12. Upon consideration of the instant Notice of Motion application including the respective affidavits and rivalling submissions, the only issue for determination is whether judgement entered herein on 2nd March 2023 should be set aside and the Defendants granted leave to file a defence.
13. The Defendants seek to set aside judgement entered herein on 2nd March 2023 on grounds that while service of summons and pleadings was effected through a newspaper advertisement, they did not see it. They also contend that their draft defence raises triable issues.
14. On setting aside of a default judgment, Order 10 Rule 11 of the Civil Procedure Rules, stipulates inter alia:

“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.”
15. On its part, the Plaintiff contends that service of summons was properly done and that the annexed draft defence does not raise any triable issue. Further, that the Defendants have no *prima facie* case to warrant setting aside the judgement of this court as they do not have registration documents to the suit land.



16. On setting aside a judgement, the Court of Appeal in *Yoosbin Engineering Corporation v Aia Architects Limited* (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR) (7 July 2023) (Judgment), held *inter alia*:
- “Whereas the nature of conditions to be imposed by the court in setting aside an ex parte judgment is an exercise of discretion, just like any other exercise of discretion, it must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court’s discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles.....”
17. The Court of Appeal in *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR, held that:
- “... In an application for setting aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law, the discretion that a Court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error.”
18. While in *Bouchard International (Services) Ltd v Philip Nzioki M’ mwereria* [1987] KECA 75 (KLR) the Court of Appeal held that:
- “The basis of approach in Kenya to the exercise of the discretion to be employed or rejected under either Rule 8 or Rule 10 (the latter dealing with judgment by default) is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside ex debito justitiae. If service of notice of hearing or summons to enter appearance has been served, then the Court will have before it a regular judgment which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial...”
19. In this instance, I note the Defendants were served via substituted service of summons through the Newspaper but they failed to enter appearance and file a Defence. Further, judgement was entered in favour of the Plaintiff on 2nd March 2023 and the resultant Decree dated the 5th April, 2023 executed and the Defendants evicted from the suit land on 26th February, 2025. The Defendants have claimed that the suit land is a way leave for power and sewer line but have not presented any documents to that effect. They have admitted that after they were evicted, the Plaintiff fenced off the suit land and put construction materials therein. However, in their submissions they claim that the Nairobi City County removed the Plaintiff from the suit land and restored them therein but never tendered any evidence in that regard.
20. I note that during the hearing, the Plaintiff produced its Letter of Allotment, Beacon Certificate, Receipts for Payment of Rates and Sale Agreement, which I opine demonstrated the root of its ownership of the suit land. The question we need to ponder is how would Nairobi City County Government issue a Letter of Allotment, Beacon Certificate and receive land rates for land which is a wayleave for power and sewer line as claimed by the Defendants. Since the Defendants did not produce any documents to prove their allegation that the suit land is a wayleave for power and sewer line, I am unable to find this argument authentic.
21. Based on the facts as presented while relying on the legal provisions cited as well as decisions quoted, I find that the Defendants who filed the instant application after almost two years from the impugned



judgement, are guilty of laches. In so far as the Defendants have relied on the case of *Phillip Mutiso Mulalya v Samuel Dominic Muathe & 2 Others* [2022] eKLR, I opine that this decision is persuasive and not binding on this court. Further, that the *Civil Procedure Rules* permits substituted service of summons, which has not been denied by the Defendants. I hence find that the Defendants were properly served.

22. It is my considered view that since the Decree has already been executed, setting aside the Judgement would mean restoring the status quo ante. I opine that this would cause undue hardship on the part of the Plaintiff that has already taken possession of the suit land and fenced it. In my view I am unable to set aside the judgement as the application has been brought too late in the day.
23. In the circumstances, I find the Notice of Motion application dated the 29th January 2025 unmerited and will proceed to dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF MAY 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:-

Kamotho for Plaintiff/Respondent

Mwai for Defendants/Applicant

Court Assistant: Susan

