



**REPUBLIC OF KENYA**

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

**ELC NO. 09 OF 2019**

FRANCIS MUTINDA MUTULA.....1<sup>ST</sup> PLAINTIFF/RESPONDENT

HANSON MUINDI MUTULA.....2<sup>ND</sup> PLAINTIFF/RESPONDENT

PATRICK MONTHE MUSILI.....3<sup>RD</sup> PLAINTIFF/RESPONDENT

KATULYA NGINGA.....4<sup>TH</sup> PLAINTIFF/RESPONDENT

VERSUS

STEPHEN KIVANDI KAMULA.....1<sup>ST</sup> DEFENDANT/APPLICANT

WAYUA MWANGANGI.....2<sup>ND</sup> DEFENDANT/APPLICANT

MUTULA MWANGANGI.....3<sup>RD</sup> DEFENDANT/APPLICANT

MBITHI MUTULA.....4<sup>TH</sup> DEFENDANT/APPLICANT

KASIVA MWANGANGI.....5<sup>TH</sup> DEFENDANT/APPLICANT

NGILA MWANGANGI.....6<sup>TH</sup> DEFENDANT/APPLICANT

**RULING**

1. The application for ruling is the one dated 16<sup>th</sup> November, 2020 and filed in court on 17<sup>th</sup> November, 2020 by the counsel for the Defendants/Applicants under certificate of urgency for orders: -

**i) Spent.**

**ii) Spent.**

**iii) That the judgement dated 11<sup>th</sup> December, 2019 to be set aside and all its consequential orders and leave be granted to the applicant to file appearance and defence.**

**iv) That costs be in the cause.**

2. The application is expressed to be brought under Order 10 Rule 11 of the Civil Procedure Rules, Sections 3A and 3B of the Civil Procedure Act. The application is predicated on the grounds on its face and is further supported by the supporting and “replying affidavits” of Kyalo Mwangangi, the 1<sup>st</sup> Defendant/Applicant both sworn with the authority of his co-defendants/Applicants at Machakos on 16<sup>th</sup> November, 2020 and 25<sup>th</sup> February, 2021 respectively.

3. The Plaintiffs/Respondents have opposed the application vide the replying affidavit of Harrison Mwangangi, the 2<sup>nd</sup> Plaintiff/Respondent herein, sworn with the authority of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiff/Respondents at Makindu on 19<sup>th</sup> January, 2011 and filed in court on 21<sup>st</sup> January, 2011.

4. The application was canvassed by way of written submissions. The Defendants/Applicants and the Plaintiff/Respondents filed their

submissions on 20<sup>th</sup> April, 2011 and 19<sup>th</sup> April, 2021 respectively.

5. The grounds upon which the application is predicated upon are that the Applicants were not served with the summons to enter appearance and the plaint thereof, that the Applicants are in imminent danger of being evicted and that the decree and orders of eviction were served upon the Applicants on 10<sup>th</sup> November, 2020.

6. The 1<sup>st</sup> Defendant/Applicant has deposed *inter alia* that he had never been served with any other court document prior to him being served with a decree and an order of eviction on or about 10<sup>th</sup> November, 2021 marked as “KM-1” and “KM-2”, that he is informed by the rest of the Applicants which information he verily believes that they were not served with summons to enter appearance, that he consequently instructed his instant Advocates who advised him and which advise he verily believes that he perused the court file and established that the court summons were allegedly served upon some of the Applicants namely Mutula Mwangangi and Wayua Mwangani, that the affidavit of service filed on 24<sup>th</sup> April, 2020 contains falsehoods (sic).

7. On the other hand, the 2<sup>nd</sup> Plaintiff/Respondent, Hanson Mwindi Mutula, has deposed *inter alia* that it is not true that the Applicants have never been served with the summons to enter appearance and the plaint in this matter since he was the one who took the process server, Andrew Mwanzia, on the 27<sup>th</sup> March, 2019 to the homes of the Defendants/Applicants having known their abode by virtue of being his relatives and having known who they are for a long time. The affiant attached a copy of the affidavit of service dated 18<sup>th</sup> April, 2019 as “HMM-2”. He went on to depose that the Applicants were served with every court documents by a different process server since it was him who used to take the process servers to the Applicants’ homes where he pointed out the Applicants, that the Applicants cannot now state that they were not served as the 2<sup>nd</sup> Plaintiff/Respondent pointed them out and has known them for years, that the Applicants cannot purport to have no information about this case as the parcels of the land in question were due to mutation of land parcel number Kiteta/Kiambwa/469 after confirmation of grant in Nairobi Succession Cause number 2004 of 1999 whereby all the parties were aware of and part of the process, that he is advised by his advocates on record, which advise he believes to be true, that despite the Applicants filing an application for stay of execution and for setting aside judgement entered on the 11<sup>th</sup> December, 2019, they have not attached any draft defence owing to the fact that they do not have any defence to the matter, and that he is further advised by his advocates on record that the law stipulates that for one to apply for setting aside, they ought to have a draft defence attached so that the court is able to determine whether there are any triable issues or not; a fact that the Applicants have not done reason being that they do not have any defence since land parcels number Kiteta/Kiambwa/1280, 1279, 1278 and 1275 solely belong to the Plaintiffs/Respondents.

8. In rejoinder, the 1<sup>st</sup> Defendant/Applicant has deposed in his replying affidavit that he was not served with the plaint and summons to enter appearance and could not make a draft defence and that the other Applicants have informed him that they were not served with summons to enter appearance and copies of the plaint.

9. He went to depose that he was not informed about the Succession Cause number 2004 of 1999 until now through the replying affidavit by the Respondents and that the judgement herein was obtained irregularly and he ought to be served first before he responds through defence.

10. In their submissions, the counsel on record for the Defendants/Applicants framed two issues for determination namely: -

***i) Whether the Applicants/Defendants were served with summons to enter appearance;***

***ii) Whether the Defendant/Applicant should be given leave to defend the Plaintiff’s suit.***

11. On whether the Defendants/Applicants were served with summons to enter appearance, the counsel cited Order 5 Rule 7 of the Civil Procedure Rules which provides: -

***“Save as otherwise prescribed, where there are more Defendants than one, service of the summons shall be made on each Defendant.***

12. The counsel further cited Rule 8(1) which provides: -

***“Whenever it is practicable, service shall be made on the Defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.”***

13. Arising from the above, the counsel submitted that summons to enter appearance were not served upon the Defendants/Applicants. The counsel pointed out that even though the affidavit of service is meant to prove that the Defendants/Applicants were served, there isn’t enough evidence to prove service in that they were neither served personally or collectively. The counsel cited Order 5 Rule 15(1) of the Civil Procedure Rules which provides the format for the preparation of an affidavit of service as follows: -

***“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.”***

14. The counsel urged that the affidavit of service (*emphasis are mine*) falls short of Order 5 Rule 15(1) in that does not show how the process server identified the 1<sup>st</sup> Defendant/Applicant and does not indicate the time of service inevitably leading to the conclusion that service was never made to the Defendants/Applicants or their authorized agents. The counsel added that no service was ever made to the 1<sup>st</sup>

Defendant/Applicant and that the affidavit of service sworn on 27<sup>th</sup> March, 2019 was improper and could not be relied upon to make up a judgement.

15. The Defendants/Applicants further submitted that Order 10 Rule 11 of the Civil Procedure Rules provides: -

***“Where judgement has been entered under this order the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.”***

16. The counsel submitted that the issue for determination is whether the default judgement was regular or not. The counsel relied on the case of **James Kanyiita Nderitu –Vs- Marios Philotas Ghikas & Anor [2016] eKLR** where the Court of Appeal sitting at Malindi stated thus: -

***“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one, which is irregularly entered. In a regular default judgement, 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 judgement. Such a Defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement 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 judgement, 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 judgement 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 judgement, among other. See Mbogo & Another -Vs- Shah (Supra), Patel -Vs- E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another -Vs- Kubende [1986] KLR 492 and CMC Holdings -Vs- Nzioki [2004] 1 KLR 173.***

***In an irregular default judgement, on the other hand, judgement 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 judgement 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 judgement 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 judgement. The reason why such judgement 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.)***

17. The counsel urged that since the Defendants/Applicants were not served, the default judgement entered herein was irregular and ought to be set aside as a matter of right.

18. On the issue of whether or not the Defendants/Applicants should be granted leave to defend the suit, the counsel cited Article 50 of the Constitution which provides for the right to fair hearing. The counsel however did not supply the court with the two authorities that he cited and I will therefore not take the authorities in question into consideration. The counsel concluded by urging the court to allow the application since the Defendants/Applicants have a strong defence and ought to be given a chance to defend themselves.

19. On the other hand, the counsel for the Plaintiffs/Respondents framed three issues for determination as follows: -

***i) Whether this court should grant stay of execution.***

***ii) Whether this court should set aside the judgement and consequential orders dated 11/12/2019.***

***iii) What are order as to costs.***

20. In answer to the Defendants'/Applicants' replying affidavit dated 25<sup>th</sup> February, 2021, the counsel for the Plaintiffs/Respondents submitted that the Defendants/Applicants were aware of the matter and that they had been served with all the court documents beginning with the summons and plaint.

21. The counsel added that if indeed the Defendants/Applicants do not have the said plaint, they were aware of the case number and details by the time they approached this court thus they had the opportunity to peruse the court file which is a public document to enable them prepare appropriately.

22. On the issue of whether the court should grant stay of execution, the counsel cited Order 22 Rule 22(1) of the Civil Procedure Rules which provides: -

***“22(1), The court to which a decree has been set for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgement debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or Appellate Court if execution has been issued thereby, or if application for execution has been made thereto.”***

23. The counsel submitted that the Defendants/Applicants have not given any reason to warrant this court to exercise its discretion and grant

an order of stay. As a matter of fact, the counsel submitted, the issue has been overtaken by events.

24. On whether the court should set aside the judgement and consequential orders dated 11<sup>th</sup> December, 2019, the counsel submitted that under Order 10 Rule 11 of the Civil Procedure Rules, the court can set aside, vary such judgement and any consequential decree or order upon such terms as are just. The counsel relied on the case of **Pithon Waweru Maina –Vs- Thuka Mugiria [1983] eKLR.**

25. The counsel further submitted that the Defendants/Applicants have not filed a draft defence and it is therefore difficult for this court to determine whether they have a defence on merit (*emphasis are mine*).

26. The counsel further submitted that the 2<sup>nd</sup> Plaintiff/Respondent who is their relative was the one who took the process servers to the homes of the Defendants/Applicants and there are affidavits of service on record to confirm this. It was also submitted that the judgement herein was therefore regular after the court confirmed and determined that service upon the Defendants/Applicants was proper.

27. The Plaintiffs/Respondents contend that they will be prejudiced if the exparte judgement is set aside since all the beneficiaries have their portions of land and that the Defendants/Applicants do not want the Plaintiffs/Respondents to enjoy what is rightfully theirs.

28. The Plaintiffs/Respondents further contend that no valid reason has been proffered for the delay in filing this application taking into consideration that judgement was delivered on 11<sup>th</sup> December, 2019 and that the decree was duly served upon them. The counsel submitted that despite the Defendants/Applicants having this information, they not only failed to move the court but have also refused to move out of the suit premises thereby warranting an application for their eviction.

29. The Plaintiffs/Respondents urged the court to dismiss the application with costs.

30. Having read the application together with the replying affidavit as well as the rival submissions filed by the counsel on record for the parties, I am of the view that the only issue for determination is whether the court should set aside the judgement dated 11<sup>th</sup> December, 2019 and all the consequential orders and thereafter grant leave to the Defendants/Applicants to enter appearance and to file their defence.

31. Even though the Defendants/Applicants have denied service of summons to enter appearance and to file their defence, they have not denied the presence of the 2<sup>nd</sup> Plaintiff/Respondent at the time when the alleged service is said to have been effected. The affidavit of service shows that he was the one who identified the Defendants/Applicants to the process server.

32. I have looked at the affidavit of service sworn at Machakos on 18<sup>th</sup> April, 2019 by one Andrew K. Mwanzia who has deponed *inter alia* that he is a process server. As earlier on stated, it shows that the process server was led to the home of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants where the two were served with summons.

33. Further the affidavit of service shows that the 2<sup>nd</sup> Plaintiff/Respondent led the process server to the home of the 3<sup>rd</sup> Defendant/Applicant and identified the said Applicant to the process server. It further shows that the 3<sup>rd</sup> Defendant/Applicant elected to receive summons on behalf of the 4<sup>th</sup> to the 6<sup>th</sup> Defendants/Applicants. Whereas, the process ought to have indicated the time when he effected service upon the Defendants/Applicants as is provided for under Order 5 Rule 15 of the Civil Procedure Rules, the Defendants/Applicants should have addressed the issue of the presence of 2<sup>nd</sup> Plaintiff/Respondent in their homes at the alleged time of service. The Defendants/Applicants ought to have applied to cross examine the process server. As it were, I am satisfied that the process server was led to the homes of the Defendants/Applicant by the 2<sup>nd</sup> Plaintiff who identified the Defendants/Applicants to him.

34. Arising from the above, my finding is that the Defendants/Applicants were properly served with summons and they cannot be heard to say that default judgement entered herein was irregular.

35. I hold that the judgement herein was regular and in the circumstances, the Defendants/Applicants ought to have annexed a draft defence to their application so as to enable the court to evaluate whether it raises triable issues. Besides, I am of the view that the Defendants/Applicants have not proffered any reasons for their failure to enter appearance, and to file their defence after having been served. Thus the court cannot exercise its discretion in their favour. For it to do so, the Plaintiffs/Respondents would be prejudiced in that they will not have the advantage of knowing the defence that they are likely to meet.

36. The upshot of the foregoing is that the Defendants/Applicants application lacks merit and same is dismissed with costs to the Plaintiffs/Respondents.

**SIGNED, DATED AND DELIVERED VIA EMAIL AT MAKUENI THIS 22<sup>ND</sup> DAY OF JULY, 2021.**

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**MBOGO C.G.**

**JUDGE**

**Court Assistant:** Mr. Mohammed.