



Rajab(Suing as the Director of Andalus Limited) v Abdalla & 6 others (Environment & Land Case E015 of 2023) [2025] KEELC 3872 (KLR) (15 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3872 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E015 OF 2023**

**YM ANGIMA, J
MAY 15, 2025**

BETWEEN

RISHARD RAMADHAN RAJAB (SUING AS THE DIRECTOR OF ANDALUS LIMITED) PLAINTIFF

AND

**MWINYI ABDALLA 1ST DEFENDANT
NELLY MOHAMED CHIVATSI 2ND DEFENDANT
BAHATI CHIVATSI 3RD DEFENDANT
AMINA MOHAMED CHIVATSI 4TH DEFENDANT
RUKIA MOHAMED CHIVATSI 5TH DEFENDANT
HALIMA MKAMBE CHIVATSI 6TH DEFENDANT
DZAME KIVATSI 7TH DEFENDANT**

RULING

1. By a notice of motion dated 27.08.2024 brought pursuant to Order 12 Rule 7 of the Civil Procedure Rules (the rules), Sections 1A, 1B and 3A of the *Civil Procedure Act* (Cap 21) and all enabling provisions of the law, the defendants sought the setting aside of the ex-parte judgment dated 13.06.2024 and all consequences orders. They also prayed that costs of the application be provided for.
2. The defendants pleaded that they were never served with summons to enter appearance hence they were unaware of the proceedings until 15.08.2024 when they were summoned before the area chief to receive a copy of the decree. It was their case that their failure to enter appearance and participate in the suit was not deliberate and that they had a good defence to the plaintiff's action hence they should be accorded an opportunity of being heard.



3. The plaintiff filed a replying affidavit sworn on 26.09.2024 and a notice of preliminary objection in opposition to the application. It was contended in the preliminary objection that the application was fatally defective because the defendants' advocates had not obtained leave of court to come on record after judgment as required under Order 9 Rule 9 of the Rules.
4. In his replying affidavit, the plaintiff pleaded that the defendants were aware of the suit all along because the 1st, 3rd and 6th defendants were served with summons via WhatsApp messaging service but they failed to acknowledge receipt. It was pleaded that the defendants had not exhibited any documents of ownership of the suit property hence they had no legitimate claim thereto.
5. The court has considered the material and submissions on record. The main question for determination herein is whether or not the defendants have made out a case for setting aside the ex-parte judgment dated 13.06.2024. The court shall not deal with the issue of the regularity of the defendants' legal representation raised in the preliminary objection since that is a procedural issue which is curable and which does not affect the jurisdiction of the court to entertain the application. The court is of the view that the alleged procedural impropriety is curable both under Article 159 (2) (d) of the Constitution and Section 19 (1) of the Environment Land Court Act.
6. The court has noted from the contents of the plaint that the plaintiff pleaded that at all material times he was the registered owner of the suit properties located in Mtwapa in Kilifi County. He pleaded that the defendants had wrongfully constructed permanent structures thereon contrary to an oral agreement they had with the previous owner which allowed them to construct temporary structures only. It was thus the plaintiff's case that the defendants' continued presence on the suit properties was unlawful and amounted to trespass. The plaintiff consequently sought various reliefs against the defendants including their eviction from the suit properties.
7. The court has seen an affidavit of service sworn by a process server known as John Kombe on 04.05.2023. He claimed to have served only the 6th defendants via WhatsApp messaging. What followed next was an application dated 22.05.2023 by the plaintiff seeking leave to serve court process through substituted service by advertisement on the basis that the defendants could not be traced for service of summons. It would appear that the said application was allowed by the court on 25.07.2023.
8. A perusal of the file indicates the notice of institution of the suit was published in the classified section of the Nation newspaper on 08.08.2023. The advertisement was so tiny and in such microscopic print that it took the court some time to trace in one of the 6 columns in the classified section. The court is of the view that the purpose of substituted service should be to alert the concerned defendants of the existence of a suit. It should thus be of a reasonable size and published in prominent manner and place. It should not be in such tiny print and tucked away in such inconspicuous place that it is unlikely to be spotted by the intended persons.
9. The court finds it strange that the plaintiff was unable to trace the defendants who were said to have illegally constructed upon and occupied the suit properties as to opt for substituted service by advisement. The material on record shows that the area chief was able to trace and summon the defendants for service of the decree without difficulty. There is no evidence on record to show that the process server took any diligent steps in tracing the defendants for service of summons. There was even no attempt to affix copies of the summons upon any conspicuous part of the houses the defendants were said to have constructed on the suit properties as provided for under Order 5 of the Rules.
10. In the premises, the court is not satisfied that the defendants were given a reasonable opportunity to know about the institution of the suit and to defend the same. The mode of service adopted was wholly inappropriate in the circumstances since the defendants were said to be in occupation of the



suit properties and the plaintiff sought to have them evicted. Worse still, the size of the newspaper advertisement was so tiny and published in such inconspicuous place that the defendants had minimal or nil chances of perusing it.

11. The court has considered the draft defence placed on record by the defendants. They claimed that the plaintiff's action was time-barred and that they had been in occupation of the suit properties for over 40 years hence they had acquired adverse possession thereof. The court is satisfied that the proposed defence raises trial issues worth going for trial. They should be accorded an opportunity of ventilating their proposed defence to the plaintiff's action.
12. The upshot of the foregoing is that the court finds merit in the defendants' application dated 30.08.2024. As a consequence, the court makes the following orders for disposal thereof;
 - a. The ex parte judgment dated 13.06.2024 is hereby set aside in its entirety together with all consequential orders.
 - b. The defendants are hereby granted unconditional leave to defend the suit.
 - c. The defendants shall file and serve their defence or defences within 14 days from the date hereof.
 - d. The plaintiff shall file a reply to defence, if need be, within 7 days upon service of the defence.
 - e. The matter shall be mentioned on 25th 06 2025 for pre-trial directions.
 - f. Costs of the application shall be in the cause.

Orders accordingly

RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 15TH DAY OF MAY, 2025.

In the presence of:

Gillian - Court assistant

Ms. Apiyo for the plaintiff

Mr. Otara for the defendants

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Y. M. ANGIMA

JUDGE

