



Athiany (Suing as personal and legal representative of the Estate of William Okoth Athiany (Deceased) v Dianga & another (Civil Case 142 of 2011) [2024] KEHC 4453 (KLR) (4 March 2024) (Ruling)

Neutral citation: [2024] KEHC 4453 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL CASE 142 OF 2011
JM CHIGITI, J
MARCH 4, 2024**

BETWEEN

SAMWEL ONDIEK ATHIANY (SUING AS PERSONAL AND LEGAL REPRESENTATIVE OF THE ESTATE OF WILLIAM OKOTH ATHIANY (DECEASED) PLAINTIFF

AND

**DANIEL ODERO DIANGA 1ST DEFENDANT
GEORGE ODIPO MUKODO 2ND DEFENDANT**

RULING

1. The application before this court is dated 25th November, 2022 wherein the applicant seeks:
 - i. Spent.
 - ii. That there be stay of further proceedings by way of execution or otherwise against the applicants/ defendants.
 - iii. That the Honourable court be pleased to set aside the proceedings, Ex-parte judgment entered on the 18/02/2013, the decree entered herein and all other consequential orders thereto.
 - iv. Spent.
 - v. That this court be pleased to grant the defendant/ applicants unconditional leave to better present their case through their advocate by filing their defence within reasonable timelines.
2. The application is supported by the affidavit dated 25th November, 2022.



Brief background:

3. It's the applicant contention that upon perusing the court file, they confirmed that the matter proceeded ex-parte after the court found that they had been duly served, that on further perusal of the court file, they found an affidavit of service by a one David Okumu Ojil sworn on the 27th July, 2011 purporting to have effected service of summons to both the defendants, bearing an alleged signature of the 1 defendant which signature does not belong to him. Further and of note, is that there is no proof of service to the 2d defendant. That it is not by choice that the defendants did not appear in court.
4. It is their prayer that they be allowed to defend the case unconditionally since there is no prejudice that is going to be occasioned to the respondent if this Honorable Court gives the Applicants such opportunity to defend and state their case against the respondent.
5. In opposition to the application, the Plaintiff/respondent filed his affidavit sworn on 2nd December, 2022.

Respondents case:

6. That be that as it may, subsequent to the filing of the instant suit, one David Okumu Ojil, a licensed process server, was instructed on 26th July 2011 to effect service of summons and pleadings upon the Defendants/Applicants herein, which he did on the same day but Defendants/Applicants same declined to Enter Appearance. Annexed hereto and marked "SOA 1" is a copy of the Affidavit of Service.
7. That for clarity, the process server visited the 2nd the Defendant's place of work Agoro Sare High school, within Oyugis town. Upon arrival, he made enquiries and he positively identified the 2nd Defendant and personally served him with the summons to enter appearance and the pleadings which he accepted for himself and on behalf of the is defendant and acknowledged service by signing and dating the return copy.
8. That upon service in terms of the foregoing paragraph, the 2nd defendant appointed the firm of Nyawiri Osero Carilus & Co Advocates to act for him. Consequently, the 2nd defendant lodged an Application seeking for orders of stay of proceedings and of execution. Besides, he also sought for an order to set aside the proceedings and judgment herein and he be allowed to file his defense out of time. For clarity the said Application is dated 2nd November, 2015 but lodged in court on 23rd November 2015.
9. That I am informed by my advocates on record which information I verily believe to be true, that the said application was slated for hearing on 31st August 2016 when both the 2nd defendant and his advocate failed to attend court and the same was dismissed by the Honourable Judge for non-attendance.
10. That, the 2nd Defendant did not file an application for reinstate the Application and/or lodge any appeal against the decision of the Honourable Judge.
11. That I am credibly informed by my Advocates on record which information I verily believe to be true, the Application herein has been brought with unexplainable inordinate delay noting that Judgment was delivered on the 18th day of April 2013. For avoidance of doubt, it has taken over 9 years since the judgment was entered for defendants to file the instant Application. Consequently, the defendants are guilty of inordinate delay and are underserving of the remedies prayed for.



12. That I am further credibly informed by my advocates on record which information I verily believe to be true, that the Defendants/ Applicants having acted in person in the instant suit and that judgment having been delivered, it became necessary for the Advocates on record for the Defendants/Applicants to first seek for leave as provided in Order 9 Rule 9 of the Civil Procedure Rules. Having failed to do so, I am advised by my Advocates on record that the Advocates therein has no audience before the Honourable court.

Analysis and determination

13. Order 10, rule 11 of the *Civil Procedure Rules, 2010* which provides thus:

“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.”

14. The position is further amplifying by Order 51 Rule 15 of the *Civil Procedure Rules* which provides: -

“The court may set aside an order made ex parte”

15. I have perused the affidavit of service of David Okumu Ojill wherein he deponed that on the 26th day of July 2011, I received copies of Summons to Enter Appearance dated 20th July 2011, Plaint indorsed with Verifying Affidavit dated 15th July 2011, from the firm of Kimanga & Company Advocates, with instructions to serve same upon the Defendants herein.

16. That on the same 26th day of July 2011, at about 12. 30 p.m, while accompanied by the Plaintiff herein, I proceeded to Agoro Sare High school, situate within Oyugis Town, in Rachuony South District, in the County of Homa-Bay, wherein I was informed that the 2nd Defendant herein works for gain as a Teacher.

17. That upon arriving at the said Institution, (details in terms of paragraph 3 hereof), the Plaintiff and I proceeded to the Staff Room, wherein we made enquiries concerning the whereabouts of the 2nd Defendant, from one of the teachers, who was sitting at the Staff Room, who however, did not disclose his name.

18. That while in the Staff Room, still conversing with the Teacher, (details in terms of paragraph 4 hereof), the 2nd Defendant herein arrived and the Teacher, who was seated in the Staff Room pointed out the 2^d Defendant unto me.

19. That besides, the Plaintiff herein who had also accompanied me and who knew the details and/or identity of the 2nd Defendant also positively identified the 2nd Defendant, who duly accepted and acknowledged that he was the said George Odipo Mukodo, the 2nd Defendant herein.

20. That upon the identification, the 2nd Defendant and I exchanged pleasantries. Besides, I also introduced myself to the 2nd Defendant and also informed him of the purpose of my visit. Subsequently, I served copies of the Summons to Enter Appearance and Plaint indorsed with Verifying Affidavit and the attendant documents, in this case upon the said George Odipo Mukodo 2nd Defendant herein, personally by tendering copies thereof to him and requiring his signature.

21. He accepted service for himself and on behalf of the 1st Defendant herein by dating and signing on the reverse of the duplicate copies, which I now return herewith duly served.

22. That the 2nd Defendant herein, informed me that he knew the 1st Defendant and admitted that same was his driver and/or agent.



23. From the foregoing, it is not clear how the plaintiff got to know the defendants. Secondly, the teacher who reportedly introduced the process to the second defendant's identity remains unknown the worst part of the whole exercise of service. Is that the process of accepted or allowed, defendant to affect service of someone's upon the defendant.
24. The option of the foregoing is that the mode of service is fatally defective, and it cannot form the basis upon which the trial court should have proceeded to enter the judgment against the defendants.
25. In an irregular default 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 v. Attorney General* [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in *Sangram Singh v. Election Tribunal, Kotah*, AIR 1955 SC 664, at 711:

“ [There must be ever present to the mind the fact that our laws 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.” The approach of the courts where an irregular default judgment.

26. The Respondent supports the applicant to the effect that for coherence, the 2nd Defendant was personally served on the 26th July 2011 with the summons to enter appearance and the Plaint which he accepted for himself and on behalf of the 1st Defendant and acknowledged service by signing and dating the return copy.
27. I will now turn to the issue of delay in filing the instant application. The Supreme Court in the case of Hon. *Christopher Odhiambo Karan v David Ouma Ocheing & 2 Others* [2018] SC Petition No. 36 of 2019 had an opportunity to discuss the significance, distinctive meaning, scope and implication of the right to a fair trial and stated that:

“ It is therefore settled law that all persons who come to any Court are entitled to a fair hearing whether the matter instituted is criminal or civil in nature. In this context, the drafters of the *Constitution* 2010 in Article 25(c) placed a bar on limitation of the right to a fair trial, in civil and criminal matters.”

28. It is my finding and I so hold that there was an inordinate delay in filing the instant application. Clearly, the Respondent has advanced diligently towards executive in the judgment.
29. On its part, the applicant has not explained nor attempted to justify the long delay in moving the court. The Applicant has not bothered to explain the fact that there was a firm of Advocates who filed an application to set aside the judgment that was dismissed.



30. It would appear like the applicant knew of the judgment but took too long to act. Equity does not come to the aid of the indolent. On its part, the Respondent has advanced in executing the judgment.

Order:

31. The application dated 25th November,2022 is dismissed with costs.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 4TH MARCH, 2024

CHIGITI J (SC)

JUDGE

