



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC NO 568 OF 2017

JACQUILINE MUTHONI WACHIRA.....PLAINTIFF

VS

MWALIMU INVESTMENT COMPANY LIMITED.....1ST DEFENDANT

MWALIMU SUKARI COMPANY LIMITED..... 2ND DEFENDANT

ANN WANJIKU MWAURA..... 3RD DEFENDANT

THE LAND REGISTRAR.....4TH DEFENDANT

RULING

1. The 3rd Defendant/Applicant filed the instant Notice of Motion dated 3rd June 2021 for orders THAT;

a. Spent.

b. Spent.

c. The ex parte proceedings of this Honorable Court and the consequential judgment and decree of this Court passed on 10th December 2020 be set aside and the 3rd Defendant be granted leave to file her defence and the case be heard *de novo* inter partes.

d. Costs of this application be in the cause.

2. The application is based on the grounds thereto and the Supporting Affidavit of **Anne Wanjiku Mwaura**, the Applicant. She deponed that on 28/5/2021 she received Court documents from **Sila Nyaga**, her tenant on land parcel No. Ruiru/Ruiru East Block 3/1715 (hereinafter referred to as the suit land). That she visited her Advocates on record and learnt the said documents were a Bill of Costs and notice for taxation. That the said Bill of costs sprung from a judgment entered against her resulting in orders of cancellation of title of the suit land.

3. The applicant denied knowledge of any suit touching on the suit land and challenged the substituted service of suit against her in the newspaper. She imputed malice on the Plaintiff's mode of service noting that they had had prior contact when they were summoned and wrote statements with their contacts at District Criminal Investigation office in December 2014. That the ex parte proceedings therefore infringed on her constitutional right to fair hearing and beseeched the Court to allow her application.

4. The Application is opposed. The Plaintiff/Respondent filed her Grounds of Opposition dated 14/6/2021 and filed on 29/6/2021 raising a preliminary objection. She resisted the Applicant's claim as offending provisions of Order 5 Rule 8, Order 1 Rule 10 by failing to serve the 1st and 2nd Defendants who were parties in the suit. She contended that the suit land was fraudulently registered in the applicant's name and termed the application frivolous and incompetent that ought to be dismissed with costs.

5. The Plaintiff/Respondent further swore a Replying Affidavit on 21/6/2021 and filed on 29/6/2021. She rehashed the hearing and determination of her suit and mode of service upon the Defendant. That the applicant's caretaker was initially served with summons to enter appearance just as he was served with the impugned Bill of costs. That therefore, the applicant deliberately chose to ignore Court summons and her instant prayers should not be granted.

6. The 1st, 2nd and 4th Defendants did not file any objection.

7. The Application was canvassed by way of written submissions. The Applicant filed her submissions dated 14/7/2021 through the firm of **Musesya & Co. Advocates**. Two issues were framed for determination; whether the ex parte proceedings and Judgement should be set aside and whether the Preliminary objection is merited.

8. In answer to the first issue, it is submitted that the core consideration is service of summons to enter appearance upon the applicant. That the process server failed to demonstrate efforts to serve the applicant personally in line with Order 5 Rule 15. That the allegation that the service done as outlined in the Respondent's Replying Affidavit is not evidenced by way of Affidavit of Service. Reliance was placed on the Court of Appeal case of **Yalwala v Indimuli & another [1989]eKLR** and **Hezron Otachi Nyambane v Julius Momanyi Ndege & 4 others[2020] eKLR**.

9. Secondly, the applicant submitted that the Preliminary objection as raised does not constitute a pure point of law. That the Court is called upon to ascertain facts on whether there was proper service or not. That in any event the judgment was against the applicant thus affecting her and the Plaintiff only.

10. Conversely the firm of **Maguta Kimemia & Associates** filed submissions dated 18/7/2021 on behalf of the Respondent. She was emphatic that service of Court summons was effected upon the applicant's caretaker who duly accepted and acknowledged the same. Nevertheless, the Plaintiff applied for substituted service and thus maintained that the Judgment of the Court was regular and proper. That the same process server who served the Bill of Costs and Notice of Taxation is the same one who served summons on 29/9/2017 while accompanied by the Respondent's husband.

11. Regarding the preliminary objection, the respondent submitted that the instant application offends provisions of Order 5 rule 8 of the Civil Procedure Rules for want of service on all parties. Further that the application is incompetent as it is not clear whether the applicant is seeking Review or Appeal against judgment. The respondent was categorical that the option of hearing the case de novo is not available to the applicant because the Court is *functus officio*.

12. In addition, the application was faulted for having been filed outside the 14 days provided in law. That no explanation has been proffered for the delay and thus ought to be dismissed with costs. That the draft defence should have been filed over three years ago.

Analysis and Determination

13. There are two main issues for determination; whether the Preliminary Objection and instant application are merited.

14. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**. At page 700 Law JA stated:

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

15. At page 701 Sir Charles Newbold, P added:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”

16. For a preliminary objection to succeed the following grounds ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the entire suit.

17. The Respondent faults the application for offending **Order 5 Rule 8** of the CPR which states;

“8. Service to be on Defendant in person or on his agent [Order 5, rule 8.]

(1) Wherever 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.

(2) A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.”

18. She further objected to the application as offending provisions of **Order 1 Rule 10** of the Civil Procedure Rules that deals with substitution and addition of parties. Going by the nature of Preliminary Objection highlighted above, the question of service is not a pure point of law that this Court can determine without calling for evidence. Service of summons is a question of fact. With that the Preliminary Objection is rejected.

19. The second consideration is whether the application is merited. It is not disputed that ex parte judgment was entered against the applicant. What is disputed is service of Court summons upon the applicant. She insists that she was not served and neither learnt of the substituted mode of service by advertisement.

20. The Court has perused the record and it is clear that summons were issued on the 16/6/2017. Vide a Notice of Motion dated the 17/1/2018 the respondent sought orders to serve the 1st - 3rd Defendants by way of substituted service on the grounds that their whereabouts could not be traced. It is disclosed that the application is supported by the affidavit of Daniel Wachira of Post office Box No 23164 -00200 Nairobi. However, the said affidavit was not annexed to the application. Instead that of the Patrick Maguta Kimemia was annexed. At para 3 of the said affidavit, the deponent states that he engaged the services of Daniel Wachira to effect service upon the 1st -3rd Defendants. That the applicant could not be traced at the suit premises in Ruai and he wrote to the Director of Criminal Investigations inquiring the whereabouts of the applicant in vain.

21. Order 5 rule 5(1) of Civil Procedure Rules sets out the person authorized to effect summons which include inter alia duly authorized person by the Court, advocate or advocates clerk duly approved by the Court, a licensed courier service provider approved by the Court and police officer appointed under the Police Act. In the instant case the Advocate states that Daniel Wachira a process server effected the service of the summons. Curiously the affidavit of service of the said process server was not annexed.

22. Order 5 rule 7 of Civil Procedure Rules is couched in mandatory terms, where there are more Defendants than one service of the summons shall be made on each Defendant. It was necessary for the process server to file an affidavit deposing how he effected the service upon the applicant. That said the respondent has contended that the summons were served upon the applicants caretaker Silas Nyaga Kivuti who was also served with the notice of motion on the 28/5/2021. The applicant admits that Silas Nyaga is her tenant in the suit premises on the suit land. The failure by the process server to swear and annex an affidavit of service creates doubt in the mind of the Court as to how service was effected.

23. The Court has perused the application for substituted services and it is not satisfied cogent reasons were advanced for the same. It is clear the Court was misled and in the end there is doubt as to the service of summons upon the applicant.

24. The substantive prayer is for setting aside of judgment and consequential proceedings and allow the applicant to file her defence. The legal underpinning for setting aside Judgment is found in Order 10 Rule 11 of the Civil Procedure Rules that;

“11. Setting aside judgment [Order 10, rule 11.]

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.”

25. The Court of Appeal in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR** in affirming the HC decision to set aside an ex parte judgment observed;

“...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, but for one reason or another, he had failed 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 the default judgment, 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 judgment 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 judgment, among other.”

26. Having held that proper service was not effected, I am of the opinion that the Judgement should be set aside as a matter of right.

27. Even if I was to be wrong on the issue of service, (which is demonstrable am not) the next stage would require the Court to exercise its discretion as to whether or not the applicant is deserving of the relief. The Applicant annexed copies of the draft defence and her title deed for the suit land as **AWM4** and **AWM5** respectively. In the draft defence, the applicant denied the respondent's claim and argued that she bought the suit land from the 2nd Defendant in 2004. That she was subsequently registered as the proprietor on 12/8/2005. Further that her ownership of the suit land would be sustainable under adverse possession having so occupied the land for over 12 years. In my view these claims cannot be said to be trivial.

28. In light of the right to a fair hearing as espoused under the Constitution, I am inclined to grant the application. Of course the respondent shall suffer prejudice in terms of delay in concluding the hearing in view of the Judgement in her favour. Weighing the prejudice against the right to be heard, this Court finds favour with the latter so that the dispute may be heard on merit.

29. In the end I find the application is merited and make orders as follows:-

a. The application is allowed.

b. The Applicant to file and serve her defence within 14 days from the date of the ruling in default the application shall stand dismissed with no further orders from this Court.

30. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 25TH DAY OF NOVEMBER 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Mr. Kimemia for the Plaintiff

1st, 2nd, 3rd and 4th Defendants – absent

Ms. Phyllis Mwangi – Court Assistant