



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 30 OF 2014

(FORMERLY KERUGOYA E.L.C CASE 674 OF 2013)

NGARI NGURU.....APPLICANT

VERSUS

JOSPHAT MACHARIA KARACHI.....1ST RESPONDENT

STEPHEN MUYA CHEGE.....2ND RESPONDENT

SUSAN NYAMBURA.....3RD RESPONDENT

ESTHER MUTHONI MACHARIA.....4TH RESPONDENT

CYRUS KARACHI MACHARIA.....5TH RESPONDENT

HENRY MWANGI NDUNG'U.....6TH RESPONDENT

JOSEPH MUIRURI KAMUNDU.....7TH RESPONDENT

RULING

1. By a notice of motion dated 3rd July 2018 brought under **Order 51 Rule 1, Order 10 Rule 9, Order 12 Rule 2 of the Civil Procedure Rules** (hereinafter the *Rules*) and, **Sections 1A, 1B, 3 and 3A Civil Procedure Act (Cap 21)** and all **enabling provisions of law**, the 1st, 3rd, 4th and 5th Respondents sought the following orders;

a. That the proceedings in the case had on 23rd February 2015 be set aside and the case be heard de novo.

b. That costs of the application be provided for.

2. The said application was based upon the grounds set out on the face of the motion and supported by the affidavits sworn by Susan Nyambura Macharia, Esther Muthoni Macharia and Cyrus Karachi Macharia on 3rd July 2018 and the annexures thereto. It was contended that the Respondents were never served with any court process by the Applicant and that they were never served with any hearing notice for 23rd February 2015.

3. The 5th Respondent stated in his supporting affidavit that at all material times he was a resident of Ruiru and had never resided at "Eastleigh Estate" where the Applicant's advocate claimed to have served him. The 3rd Respondent also disputed having been served. She stated that at all material times she was residing at her matrimonial home at Kairo in Muranga County and had never resided at the said "Eastleigh Estate" where she was allegedly served by the Applicant's advocate. The 4th Respondent stated that at all material times she was a resident of Juja and denied having been served at "Eastleigh Estate."

4. The Applicant filed a replying affidavit in opposition to the Respondent's said application. It was sworn by Macharia Muraguri, the advocate on record for the Applicant. It was contended that if the Respondents were aggrieved by the proceedings of 23rd February 2015, they should have either filed an appeal or sought a review. It was further contended that this court being a court of coordinate jurisdiction with the High Court it had no power to set aside proceedings conducted by the High Court on 23rd February 2015. It was also contended that the original applicant is deceased hence it would occasion great prejudice to allow the instant application since the deceased would be unable to testify.

5. When the said application was listed for hearing on 8th October 2018, the Respondents' advocate was ready to prosecute it but the Applicant's advocate was said to be away attending a funeral at Molo. The court, therefore, directed the parties to file and exchange their written submissions on the application and the matter was fixed for ruling on 7th March 2019. The record shows that the Respondents filed their written submissions on 8th October 2018 whereas the Applicant filed his on 31st October 2018.
6. The court has considered the Respondents' notice of motion dated 3rd July 2018, the Applicant's replying affidavit in opposition thereto as well as the written submissions on record. The main questions for consideration in this matter are twofold. First, whether this court has jurisdiction to entertain the instant application. Second, whether the Respondents have made a case for setting aside the proceedings of 23rd February 2015 which were conducted in their absence.
7. The first issue was raised in the Applicant's replying affidavit. It was pursued in his written submissions. This issue was not addressed by the Respondents in their written submissions. This court is, however, unable to agree that this court has no jurisdiction to entertain the application for setting aside proceedings conducted before the High Court in the absence of the Respondents. The court does not agree with the Applicant's submission that the only available redress mechanism open to the Respondents was either an appeal or review. There was certainly nothing to appeal against or to review. It is noteworthy that the Applicant did not cite any authority to support his submission.
8. A party who alleges that proceedings were conducted without proper service can certainly seek to set aside such *ex-parte* proceedings as provided for under **Order 12 Rule 7 of the Rules**. Such application can quite properly be made to the court seized of the matter at the time of making it. It cannot be denied that although the suit was originally filed before the High Court and although it was partly heard before the same court, the suit was ultimately transferred to the Environment and Land Court when the latter became operational. The Environment and Land Court can, therefore, exercise all the powers the High Court may have had in entertaining an application for setting aside *ex-parte* proceedings under **Order 12 Rule 7 of the Rules**. It cannot be seriously contended that entertaining such an application would be sitting on appeal over a decision of the High Court. It is noteworthy, again, that the Applicant's advocate did not cite any authority in support of his submission.
9. The court takes the view that the principles which apply to setting aside of an *ex-parte* judgement or order equally apply to the setting aside of proceedings conducted *ex-parte*. In the case of **Girado Vs Alam & Sons (U) Ltd [1971] EA 448** the Applicant applied to set aside a judgement which had been given in the absence of his advocate. Although the court found that no sufficient reason had been shown for non-appearance, the court nevertheless allowed the application in order to avoid injustice to the Applicant.
10. Similarly, in the case of **Patel Vs E.A Cargo Handling Services Ltd [1974] EA 75**, the court held that the discretion of the court to set aside an *ex-parte* judgement was not limited. It was held that "there are no limits or restrictions on the judge's discretion except that if he does vary the judgement he does so on such terms as may be just". The Court of Appeal rejected the suggestion by the Appellant that before an order for setting aside must be made, a good cause for non-appearance must be shown as well as a defence on the merits of the case.
11. In the Kenyan context, it has been held that where an Applicant is able to demonstrate that there was no or no regular service of summons, he is entitled *ex-debito justitiae* to a setting aside. If, on the other hand, service is shown to have been proper and regular, the Applicant may be required to demonstrate at least some form of defence to the action. See **Gandhi Brothers Vs H.K Njage t/a H.K. Enterprises NBI HCCC No. 1330 of 2001**.
12. The court has examined the material on record regarding service of court process upon the Respondents. The court has noted that the Applicant has not controverted or challenged the clear and straight forward depositions of the Respondents on how flawed the purported service was. The Applicant has completely avoided responding to the factual averments contained in the 3 supporting affidavits. The court construes such avoidance as a concession that, indeed, the purported service was fictitious. The affidavits of service which were sworn and filed by Macharia Muraguri the advocate on record for the Applicant were lacking in all the crucial details which would validate service of process.
13. The court agrees with the Respondents' advocate that the proper test to be applied in determining the propriety and validity of service of court process are those set out in the cases of **National Bank of Kenya Ltd Vs Puntland Bank of Kenya Ltd [2006] eKLR** and **Development Bank of Kenya Ltd Vs Riva Oil Company Ltd & 3 Others [2015] eKLR**. It would appear that most of the material particulars were lacking because there was no actual service upon the Respondents. The court believes the Respondents that they were not residents of Eastleigh at the material time. No wonder one of the affidavits of service claimed that the 3rd Respondent's father was present whereas he was long deceased.
14. There is no indication in the court file that the Applicant ever sought and obtained leave to serve hearing notices upon the Respondents through substituted service. The best mode of service for purposes of legal proceedings is personal service. The Respondents had an advocate on record whose physical address for service was known. It is, therefore, not clear why the Applicant wanted to use a short-cut in the service of a hearing notice. In any event, it would appear from the material on record that the Applicant's advocate even got the postal address wrong. It was indicated as P.O. Box 64332 Nairobi instead of P.O. Box 74332 Nairobi.
15. In the circumstances, the court is satisfied that there was no service of court process upon the Respondents hence they are entitled to unconditional setting aside of the proceedings of 23rd February 2015 as a matter of right and "*bila maneno*" since the proceedings were occasioned by the Applicant's own default. The court is not persuaded that the Respondents should be driven from the seat of justice simply because the original Applicant is deceased or because it would be difficult to obtain alternative witnesses. That situation was clearly of the Applicant's own making and he should not be allowed to use it to the prejudice of the Respondents.
16. The upshot of the foregoing is that the court finds merit in the Respondents' notice of motion dated 3rd July 2018 and the same is consequently allowed in terms of prayer No. 1 thereof. The Applicant shall bear the costs of the application for reasons which are clear from the ruling.

17. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **7TH** day of **MARCH, 2019**.

In the presence of Mr Karera holding brief for Mr Muraguri for Applicant, Mr Ithiga holding brief for M/S R.W. Chege for the 1st, 3rd, 4th, 5th Respondents and in the absence of the 2nd, 6th and 7th Respondents.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

07.03.19